Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1427

REV. PAUL A. McDANIEL - - - - - - - - - - - - - - - - - Appellant,

v.

SELMA CASH PATY, a resident of Hamilton County, Tennessee; SHIRLEY HASSLER, as Coordinator of Elections of the State of Tennessee; LYTEL LANDERS, as Chairman of the State Election Commission of Tennessee; RAY BLANTON, as Governor of the State of Tennessee; BROOKS McLEMORE, as Attorney General of the State of Tennessee; JOE C. CARR, as Secretary of State of Tennessee; JAMES HARPSTER, TOMMY POWELL, RICHARD HOLCOMB, JACK SEATON, as Members of the State Election Commission of Tennessee; CHARLES HINSON, Chairman of the Hamilton County Election Commission; CLAUDE CLARK, TOMMIE CARTER, JAMES PENLEY, ALBERT W. SECOR, as Members of the Hamilton County Election Commission; TOM MOORE, JR., as Registrar-at-Large for the Hamilton County Election Commission, - Appellees.

On Appeal from the Supreme Court of Tennessee

JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO.

REVEREND PAUL A. McDANIEL,
Appellant,

v.

SELMA CASH PATY, ET AL.,
Appellees.

ON APPEAL FROM
THE SUPREME COURT OF TENNESSEE

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Tennessee entered March 7, 1977, in which the Supreme Court of Tennessee reversed the judgment of the Chancery Court of Hamilton County, Tennessee entered October 25, 1976. The decree of March 7, 1977 of the Supreme Court of Tennessee is the final judgment of the highest court of the State of Tennessee.

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee, dated March 7, 1977, is not yet reported. Copies of the decree and opinion are attached as Appendices A and B. The opinions of the Chancery Court of Hamilton County are unreported. Copies of the opinions and final judgment of the Hamilton County Chancery Court are attached as Appendices C, D and J.

JURISDICTION

The jurisdiction of the Supreme Court to review the final judgment of the Supreme Court of Tennessee is conferred by 28 U.S.C. § 1257(2). *See Torcaso v. Watkins*, 367 U.S. 488 (1961); *Sherbert v. Verner*, 374 U.S. 398 (1963).

STATUTES INVOLVED

Tennessee Constitution, Article IX, Section 1, the validity of which is drawn in question, provides:

> "Ineligibility of ministers and priests to seats in legislature. —Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no Ministers of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature".

The provisions of the Tennessee Constitution, Article IX, Section 1, were made applicable as a qualification for election to the 1977 limited constitutional convention of Tennessee by 1976 Tennessee Public Acts, Chapter 848, Section 4, which provides:

> "Any citizen of the state who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for delegate to the convention upon filing with the County Election Commission of his county a nominating petition containing not less than twenty-five (25) names of legally qualified voters of his or her representative district. Each district must be represented by a qualified voter of that district. In the case of a candidate from a representative district comprising more than one county, only one qualifying petition need be filed by the candidate, and that in his home county, with a certified copy thereof filed with the Election Commission of the other counties of his representative district".

QUESTIONS PRESENTED

I. Whether the legislative call for a limited constitutional convention (1976 Tennessee Public Acts, Chapter 848, Section 4 establishing the qualifications of delegates as the same as those for membership in the House of Representatives, thus invoking the Tennessee Constitution, Article IX, Section 1) deprives appellant of the free exercise of religion guaranteed by the First and Fourteenth Amendments of the United States Constitution.

II. Whether the legislative call for a limited constitutional convention is an establishment of religion in violation of the First and Fourteenth Amendments of the United States Constitution.

III. Whether the legislative call for a limited constitutional convention deprives appellant of the right to vote in violation of the Equal Protection Clause of the Fourteenth Amendment.

IV. Whether the legislative call for a limited constitutional convention deprives appellant of the right to be a candidate for public office in violation of the Equal Protection Clause of the Fourteenth Amendment.

V. Whether the legislative call for a limited constitutional convention deprives appellant of due process of law secured by the Fourteenth Amendment of the United States Constitution in that the Tennessee Constitution, Article 9, Section 1 is unconstitutionally vague.

VI. Whether the legislative call for a limited constitutional convention imposes a religious test as a qualification for office or public trust in violation of the United States Constitution Article VI, Clause 3.

STATEMENT OF THE CASE

Appellant, Reverend Paul A. McDaniel, pastor of the Second Missionary Baptist Church in Chattanooga, Tennessee filed as a candidate for delegate to the 1977 limited constitutional convention from the 29th House District of Tennessee. On September 28, 1976 Selma Cash Paty, one of the appellees here, filed suit in the Chancery Court of Hamilton County against appellant and certain of the appellees requesting a declaration that appellant was disqualified to serve as delegate and an order striking appellant's name from the ballot under 1976 Tennessee Public Acts, Chapter 848 and the Tennessee Constitution, Article IX, Section 1. (The original complaint of appellee Selma Cash Paty and appellant's original answer are included as appendices E and F).

The Chancery Court of Hamilton County on October 5, 1976 declared appellant eligible to seek the office of delegate and invalidated on First and Fourteenth Amendment grounds the provisions of 1976 Tennessee Public Acts, Chapter 848, and the Tennessee Constitution, Article 14, Section 1 as applied to appellant's candidacy for or service as a delegate at the 1977 limited constitutional convention.

(Appendix C) An appeal was taken to the Tennessee Supreme Court which on October 15, 1976 was remanded for failure of the record to reflect that the state attorney general had been made a party or served in accordance with Tennessee Code Annotated §23-1107 and Rule 24.04 of the Tennessee Rules of Civil Procedure.

On October 21, 1976 appellant filed an amended answer and cross complaint naming additional of the appellees as defendants in this case and seeking further relief. A copy of the amended complaint filed by appellant is included as Appendix G. The Chancellor certified appellants amended answer and complaint as a class action (Appendix H). The answer of appellee Selma Cash Paty to appellant's amended answer and cross complaint was filed October 22, 1976 and is included as Appendix I.

The Chancery Court of Hamilton County on October 22, 1976 again declared appellant qualified to seek the office of delegate to the 1977 limited constitutional convention from the 29th House District of Hamilton County (Appendix D) and on October 25, 1976 entered final judgment (Appendix J) and an order granting an appeal to the Tennessee Supreme Court.

During the pendancy of the appeal in the Tennessee Supreme Court, the election of November 2, 1977 was held and appellant was elected as a delegate to the 1977 limited constitutional convention from the 29th House District of Hamilton County by the following vote: Paul A. McDaniel - 4,570; Selma Cash Paty - 2,944; Samuel Lee Doney - 900; Ralph W. Timberlake - 743.

On March 7, 1977 the Tennessee Supreme Court entered a decree and opinion (Appendices A and B) reversing the judgment of the Chancery Court of Hamilton County

and directing that an order be issued by the clerk of the Tennessee Supreme Court certifying to the Governor, the Secretary of State and the legislative body of Hamilton County that a vacancy for the position of delegate to the 1977 limited constitutional convention exists in the 29th House District, Hamilton County, by virtue of Reverend Paul A. McDaniel's ineligibility and adjudging costs against Reverend Paul A. McDaniel. On March 16, 1977 appellant filed a notice of appeal to this Court from the final judgment of the Tennessee Supreme Court.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

Appellant is a minister of the gospel within the meaning of the Tennessee Constitution, Article IX, Section 1. According to the decree of the Supreme Court of Tennessee, appellant is not qualified to hold the office of delegate to the 1977 Tennessee limited constitutional convention to which the people of the 29th House District of Hamilton County elected him by a substantial margin. The question raised by this case is, thus, closely akin to the question presented in *Torcaso v. Watkins*, 367 U.S. 488 (1961), in which this Court invalidated a Maryland law requiring a "declaration of belief in the existence of God" as a qualification for public office on the ground that it "unconstitutionally invades the appellant's freedom

of belief and religion." *Torcaso v. Watkins*, 367 U.S. at 496. The Tennessee Supreme Court distinguished *Torcaso* from the instant case—erroneously, it is submitted— on the ground that "Article IX, Section 1 [of the Tennessee Constitution] does not have the effect of forcing ministers and priests to profess a belief or disbelief in any religion." *Paty v. McDaniel*, Appendix B at 17. The Tennessee court's application of *Torcaso* is inconsistent with this Court's holdings that state classifications which penalize citizens for the exercise of *fundamental* rights can be justified only when *necessary* to promote a *compelling* governmental interest. *See Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Dunn v. Blumstein*, 405 U.S. 331 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

It is difficult to comprehend how the Tennessee Supreme Court could conclude that the Tennessee Constitution, Article IX, Section 1 "does not infringe upon religious belief or religious action within the protection of the free exercise clause" and is only an "indirect burden" on the right of free exercise. *Paty v. McDaniel*, Appendix B at 17-18. The right of Reverend McDaniel to serve his congregation as a minister of the Gospel is a *fundamental* right secured by the free exercise clause. Few personal freedoms, if any, are of greater constitutional significance than the right of an individual to believe, preach and serve as minister to those of like religious persuasion. For invoking his free exercise right to be a minister of the Gospel, the State of Tennessee exacts a cruel penalty— it relegates Reverend McDaniel and other ministers to the level of second class citizenship. The Tennessee Constitution, Article IX, Section 1, presents Reverend McDaniel with a Hobson's choice: he must either forego his constitutionally protected right to be a minister of the

Gospel or abstain from the exercise of equally fundamental rights of voting and political candidacy. To suggest, as the Tennessee Supreme Court does, that it is "not religious belief, but the career or calling . . . that disqualified," *Paty v. McDaniel*, Appendix B at 8, ignores that appellant's pursuit of the career or calling of minister is a fundamental, constitutionally protected freedom, the exercise of which can not be conditioned upon forebearance of equally fundamental rights of voting and political candidacy.

The Tennessee Supreme Court concluded that the exclusion of ministers "from the law-making process of government is justified by the compelling state interest in maintaining the wall of separation between church and state." *Paty v. McDaniel*, Appendix B at 18. But no *state* interest in a "wall of separation" which diminishes *federal* rights of free exercise is compelling. Moreover, the asserted "compelling state interest" was based upon judicial notice taken of a series of highly dubious propositions for which no empirical authority was offered:

> . . . that ministers and priests could be expected, if and when serving in the Legislature, to do everything within their professional and spiritual powers of persuasion to further the aims of religion by sponsoring, advocating and voting for legislation that could or might violate both the free exercise and establishment clauses of the First Amendment; that without regard to the degree of success they might achieve, such activity would constitute a devisive force sufficient to constitute a significant

> violation of the Doctrine of Separation of church and state; that history will reflect that all governmental action that has been condemned by the First Amendment and the judicial decisions interpreting same has been sponsored and enacted by religiously motivated members of the legislature in direct response to the leadership of religious sects; that the effectiveness of that religious leadership in the governmental sector would be greatly enhanced by the presence in the State's highest deliberative bodies of ministers and priests. *Paty v. McDaniel*, Appendix B, at 14-15.

The Tennessee Supreme Court has painted with far too broad a brush. Absent reliable empirical evidence to the contrary, it should not be assumed that ministers and priests as a group are any more or less qualified for public office or any more or less supportive of the religion clauses of the First Amendment[1] than the population generally or other discrete occupational groups. It is patently unfair and inaccurate to conclude that all ministers elected to public office would "do everything within their powers to further the aims of religion" as the Tennessee Supreme Court assumes. Permanent and irrebuttable presumptions which are not necessarily or universally true in fact are disfavored. *See*, for example, *Vlandis v. Kline*, 412 U.S. 441 (1973). The Tennessee Constitution, Article IX, Section 1, conclu-

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[1] If anything, a stronger case could probably be made that the clergy as an occupational group are more supportive of the religion clauses than the population generally since support for civil liberties increases with educational level and most clergy have a higher educational level than the population generally.

sively presumes—erroneously, it is urged—that no ministers of the gospel or priests of any denomination whatever can "render unto Caesar the things which are Caesar's and unto God those things which are God's." *Matthew* 22:21.

The conclusive presumption of unfitness of ministers to hold public office legislatively attaints an entire occupational group in a manner closely akin to that proscribed by Bill of Attainder Clause of the United States Constitution, Article I, Section 9, Clause 3. *See Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867); *United States v. Brown*, 381 U.S. 437 (1965).

In upholding the Tennessee Constitution, Article IX, Section 1, against appellant's free exercise claim, the Tennessee Supreme Court relied principally upon the authority of *Braunfeld v. Brown*, 366 U.S. 599 (1961). *See Paty v. McDaniel*, Appendix B, at 10-13. But *Braunfeld* is not dispositive of this case for several reasons. Appellant here is forced to choose between mutually exclusive rights of free exercise and equally fundamental rights of voting and candidacy. In contrast, appellants in *Braunfeld* were burdened only *economically* by the State's day of rest mandate in that the practice of their religious beliefs was made more expensive. *Braunfeld v. Brown*, 366 U.S. at 603, 605. State power to affect adversely commercial activity is far more extensive than state authority over fundamental political rights. *Compare*, for example, *Ferguson v. Skrupa*, 372 U.S. 726 (1963) with *Lubin v. Panish*, 415 U.S. 709 (1974). Second, the secular interest in a uniform day of rest arguably made *necessary* the Sunday law in *Braunfeld*. It has been said that the "effect of Tennessee's constitutional provision

prohibiting service [of ministers and priests] in the Generaly Assembly is to advance the state's goal of maintaining the separation between church and state." *Paty v. McDaniel*, Appendix B, at 13. However, separation between church and state can be maintained by alternative means far less intrusive of appellant's fundamental rights of free exercise of religion, voting and political candidacy:

> . . . the disqualification imposed by this statute is [not] a necessary means of maintaining permissible "separation of Church and State," of preventing "an establishment of religion." If the appellee should persuade a majority of his delegates to propose an amendment to the Constitution which would infringe upon religious liberty and if the electorate of the State should ratify such amendment, still the courts of the state and federal courts would stand ready, willing and able to strike it down before any harm could occur. *Paty v. McDaniel*, Appendix B, dissenting opinion at 4-5 (Brock, J., *dissenting*).

Third, the alleged intrusion upon free exercise rights in *Braunfeld* was temporally limited (one day a week) whereas the disability incident to appellant's right of free exercise here is total—he remains disqualified completely from certain public offices for which he is otherwise qualified so long as he remains a minister of the Gospel. While it is true that the non-establishment of religion may be "far higher on the scale of legitimate state goals than the mere convenience of having everyone rest on the same day," *Paty v. McDaniel*, Appendix B, at 13, the Tennessee Supreme Court failed to demonstrate that the state's asserted interest in separation of church and state could only be advanced by the Tennessee Constitution, Article IX, Section 1.

Appellant's free exercise claim is likewise supported by *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). *Sherbert*, *Yoder* and *Barnette* each involved religious *activity* as opposed to religious *belief*. The ministry of Reverend McDaniel is a constitutionally protected, religious activity comparable to the refusal of the Seventh Day Adventist to work on the Sabbath in *Sherbert*; the refusal of Amish parents to permit public education of their children beyond the eighth grade in *Yoder* and the refusal of Jehovah's Witnesses to salute the flag in *Barnette*. The Tennessee Supreme Court erred in concluding that appellant's reliance on *Sherbert*, *Yoder* and *Barnette* was inapposite. *Paty v. McDaniel*, Appendix B, at 15-17. The religious activities of appellant here deserve protection equal to the religious actions protected in *Sherbert*, *Yoder* and *Barnette*. Unlike *Braunfeld*, the instant case does not involve a countervailing, strong state interest which can not be served otherwise than by a provision such as the Tennessee Constitution, Article IX, Section 1.

Reverend McDaniel's ministry of the Gospel admittedly involves *action* as well as belief. Appellant acknowledges that while the freedom to believe is absolute, the freedom to act is not. *Reynolds v. United States*, 98 U.S. 145 (1879); *State of Tennessee ex rel. Swann v. Pack*, _____ Tenn. _____, 527 S.W.2d 99 (1975). Reverend McDaniel's ministry, however, is action constitutionally protected by the free exercise clause because appellant's ministry does not implicate countervailing social interests in morality or personal safety involved in *Reynolds* or *Pack*. The free exercise claims in this case are, thus—contrary to the decree of the Tennessee Supreme

Court—governed by *Torcasso*, *Sherbert*, *Yoder*, and *Barnette* rather than *Braunfeld*. As this Court observed long ago, albeit in *dicta*, the free exercise clause of the First Amendment proscribes any law which would deny public office to one who takes an "active part in missionary work." *Wieman v. Updegraff*, 344 U.S. 183, 191-92 (1952). Reverend McDaniel takes "an active part in missionary work" through his ministry—a role deserving of protection against civil disabilities under the free exercise clause. The right to public office, like the right to public benefits, *Speiser v. Randall*, 375 U.S. 513 (1958), should not be conditioned on the non-exercise of constitutionally secured liberties.

The disqualification of ministers under the Tennessee Constitution, Article IX, Section 1 is an anachronism handed down from the original Tennessee Constitution approved in 1796 and "derived from the 1776 North Carolina Constitution and the 1784 Constitution of the lost State of Franklin."[2] *See Paty v. McDaniel*, Appendix B, at 5-6 and Brief and Argument of Appellee Reverend Paul A. McDaniel in the Tennessee Supreme Court at 16 and Appendices I, II and III. (A copy of appellee's brief in the Tennessee Supreme Court *supra* was provided to the Court

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[2] The provision in the North Carolina Constitution of 1776 disqualifying ministers from legislative office was omitted from subsequent North Carolina Constitutions. **Compare** North Carolina Constitution of 1776, Article XXXI **with** North Carolina Constitution of 1868, Article VI, Section 5 and North Carolina Constitution of 1876, Article VI, Section 8, in 5 AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS 2793, 2815, 2836 (F. Thorpe, ed. 1909). Ministers and preachers of the Gospel were also disqualified from legislative office in Maryland. **See** Maryland Constitution of 1851, Article III, Section 11 and Maryland Constitution of 1867, Article III, Section 11 in 3 AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS **supra** at 1722, 1791. Maryland's disqualification was recently invalidated on free exercise grounds. **Kirkley v. State of Maryland**, 381 F. Supp. 327 (D. Md. 1974).

in appellant's application to Mr. Justice Stewart for a stay denied March 17, 1977 in A-758).

Historically, along with compulsory taxation for religion, disqualification for public office was, prior to the establishment of our Constitution, one of the most common means of impairing religious freedom. *See* F. Swancara, "The Surviving Religious Test," 18 ST. LOUIS L. REV. 105 (1933). The geneology of the Tennessee Constitution, Article IX, Section 1 derives from a far less tolerant strand of our history antecedent to the Federal Republic, *see* F. Le Clercq, "The Emerging Federally Secured Right of Political Participation," 8 IND. L. REV. 607, 610 (1975), and was repudiated by the religion clauses of the First Amendment.

It is no accident that Jefferson's Virginia Statute Establishing Religious Freedom, upon which the First Amendment is based, addressed itself to disqualification for public office:

> . . . The proscribing of any citizen as unworthy of public confidence by laying upon him an incapacity of being called to offices of trust and emolument unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right. 12 Henig, Virginia Statutes at Large 84.

Thus, the operative section of the Virginia statute provided that no person "shall be enforced, restrained, molested or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all [persons] . . . shall be free to profess, and by argument to maintain, their opinion in matters of

religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities."

Appellant here asks no more than the free exercise clause of the First Amendment and the Virginia Statute Establishing Religious Freedom authored by Jefferson upon which the free exercise clause of the First Amendment was based, were intended to secure: that Reverend McDaniel's religious opinions, professions or activities should in no wise diminish his civil capacities.

II.

Appellant below urged that the Tennessee Constitution violates the establishment clause upon the authority of *Everson v. Board of Education*, 330 U.S. 1 (1947); *McCollum v. Board of Education*, 333 U.S. 203 (1948); *Engle v. Vitale*, 370 U.S. 421 (1962); *School District v. Schempp*, 374 U.S. 203 (1963); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Lemon v. Kurtzman*, 403 U.S. 601 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Daniel v. Waters*, 515 F.2d 485 (6th Cir. 1975). Certain controlling constitutional guidelines have emerged from previous establishment clause litigation. *See* F. Le Clercq, "The Monkey Laws and the Public Schools: A Second Consumption", 27 VAND. L. REV. 209, 214-26 (1974). First, the law or act in question must reflect a clearly secular legislative purpose. Second, it must have a primary effect which neither advances nor inhibits religion; and, thirdly, it must avoid excessive government entanglement with religion. The 1976 call to the limited constitutional convention incorporating the Tennessee Constitution, Article IX, Section 1, thereby

excluding ministers as delegates, runs afoul of each of the three approved Establishment Clause guidelines.

Purpose. The Tennessee Constitution, Article IX, Section 1, has an avowedly religious purpose—to prevent Christian ministers and priests from "being diverted from the great duties of their functions."[3] It is immaterial whether the effect of the Tennessee Constitution, Article IX, Section 1, is to favor or to penalize ministers and priests. The original purpose—albeit benificent or punitive—was clearly non-secular and sectarian. The Tennessee Supreme Court did not rebut appellant's religious purpose argument but responded only: "We disagree with that interpretation." *Paty v. McDaniel*, Appendix B, at 18.

Legislation initially enacted for non-secular purposes can, of course, be upheld upon showing of an evolution of legislative purpose from religious to secular concerns. *See McGowan v. Maryland*, 366 U.S. 420 (1961) and *Braunfeld v. Brown*, 366 U.S. at 602. In contrast to *McGowan* and *Braunfeld*, it is impossible to discover or articulate an evolving secular legislative purpose sufficient to uphold the Tennessee Constitution, Article IX, Section 1.

The Tennessee Supreme Court's effort to recast Article IX, Section 1, of the Tennessee Constitution "to embrace the counterparts of ministers, priests and rabbis in every religious sect whatever may be their title or designation," *Paty v. McDaniel*, Appendix B, at 18, diminishes, but

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[3] The placement of the provision disqualifying ministers and priests from serving in the legislature in the same constitutional article with a test oath similar to the one invalidated in **Torcasso** was by design. **See** Tennessee Constitution of 1796, Article VIII, Sections 1 and 2 in E. SCOTT, LAWS OF TENNESSEE, 1715-1820, at 534. **See also** JOURNAL OF THE PROCEEDINGS OF A CONVENTION BEGAN AND HELD AT KNOXVILLE, JANUARY 11, 1796, at 23 (1796 ed., reprinted 1852).

does not eliminate, the provision's sectarian bias. (*See* IV, *infra*). As construed by the Tennessee Supreme Court, the provision purports to be—but, in fact, is not—ecumenical. (*See* IV and *entanglement*, *infra*.) Moreover, the gloss placed by the Tennessee Supreme Court on Article IX, Section 1 does not disturb appellant's claim that the original purpose of the Tennessee constitutional provision was religious and that the original purpose has not been supplanted by a legitimate secular interest.

Effect. The effect of the Tennessee Constitution, Article IX, Section 1, both advances and inhibits religion in violation of the establishment clause. The provision amounts to an advancement of religion because its effect is to prevent ministers and priests from being diverted from their religious tasks. The provision inhibits religion because it imposes a civil penalty on free exercise rights.

While the Tennessee Supreme Court's construction of Article IX, Section 1 may diminish the scope of claims that the provision "aid[s] one religion . . . or prefer[s] one religion over another," *Everson v. Board of Education*, 420 U.S. at 15, the Tennessee Supreme Court's opinion does not affect appellant's claim that Article IX, Section 1 of the Tennessee Constitution, as construed, "aid[s] all religions." *Everson v. Board of Education*, 420 U.S. at 15. The Tennessee Supreme Court in one instance conceded that the disqualification of ministers from public office was an aid to religion:

> . . . it is also true that a minister or priest is faced with the choice of abandoning either his leadership role in religion or any hope of serving the people of his district in the State Legislature. *Paty v. McDaniel*, Appendix B, at 7.

Although appellant urges that the dilemma posed by this hypothetical is unrealistic, the presumed effect of the Tennessee Supreme Court's decree would be to advance religion by enhancing the effectiveness of church leadership.

Appellant also urges that the constitutional disqualification of ministers from legislative office in Tennessee *inhibits* religion in a manner proscribed by the establishment clause. This Court has observed that because of the establishment clause, "[n]o person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance." *Everson v. Board of Education*, 330 U.S. at 15-16. Reverend McDaniel's ministry is inextricably interwoven with the entertainment and profession of his religious beliefs with which the State of Tennessee can not interfere under the establishment clause. Reverend McDaniel's ministry is closely related to his church attendance and reflects the leadership position he occupies in his congregation. *Everson* stated that it is unconstitutionally impermissible for the state to punish citizens for church attendance. By analogy, it should likewise be impermissible for the state to punish citizens for accepting leadership roles in their congregations and expressing their religious beliefs through the ministry. Christian ministry, though by no means restricted to pastors, is often an outgrowth of belief and church attendance.

The Tennessee Supreme Court apparently contradicted its conclusion that the constitutional disqualification of ministers from legislative office "simply does not impose any burden, direct or indirect upon religious belief or religious action" with its admission that there is

> . . . some validity in describing the effect of Article IX, Section 1, as prohibiting legislative service because of a person's leadership role in a religious faith. *Paty v. McDaniel*, Appendix B, at 7-8.

The Tennessee Supreme Court expressed fear that religious strife would be fomented by the candidacy of ministers—a fear that Brock, J., *dissenting* found "unpersuasive" and without basis. *Paty v. McDaniel*, Appendix B, at 9-10 and dissenting opinion, at 5. As Brock, J., observed in his dissent, the "national government and the 49 other states get along very well without such a disqualification of ministers." *Paty v. McDaniel*, Appendix B, dissenting opinion, at 3.

The convoluted "separation of church and state" rationale adopted in the majority opinion of the Tennessee Supreme Court represents an extreme position incompatible with this Court's effort to allow for "play at the joints" and to accommodate competing free exercise and establishment claims whenever possible. The establishment clause of the federal constitution obviously provides no support for the position of the Tennessee majority since neither ministers nor priests are disqualified from candidacy for any federal elective office. The Tennessee Supreme Court's mandate declaring a "wall of separation between church and state" is a *state* constitutional doctrine which deprives fundamental rights secured by the free exercise and establishment clauses of the federal Constitution.

It is correct, as the majority below suggested, that numerous First Amendment decisions of the Supreme Court reflect that one of the purposes of the establishment clause is to prevent political campaigns from degenerating

into battles between religion and non-religion or which pit one religion against another. *Paty v. McDaniel*, Appendix B, at 10. The majority opinion below failed to establish, however, that the danger of political cleavage along religious lines would be significantly increased if ministers and priests were permitted to seek legislative office. The fears of the Tennessee majority do not appear warranted when one considers that ministers and priests are not disqualified from a wide range of public offices in Tennessee—governor, mayor, city councilman, sheriff, squire or judge—and the campaigns for such offices have not significantly increased political cleavage along religious lines.

Even assuming that the candidacy of ministers or priests for legislative office would unleash the "potentially 'divisive forces'" feared by the Tennessee majority, appellant contends that, on balance, the danger is not sufficient to override his free exercise and establishment claims. The Tennessee court's apprehensions appear unwarranted upon the basis of the federal experience, the experience in other states and the experience in Tennessee as applied to offices outside the scope of Article IX, Section 1 of the Tennessee Constitution.

Entanglement. The Tennessee Constitution similarly raises difficult entanglement problems. The courts are, of course, arms of the state. *Shelley v. Kraemer*, 334 U.S. 1 (1948). Can courts assume the responsibility for deciding who are ministers of the Gospel or priests without becoming embroiled in religious controversy? *See*, for example, *Serbian Eastern Orthodox Diocese for U. S. of American and Canada v. Milivojevich*, 44 U.S.L.W. 4927 (U.S. June 21, 1976).

There are no judicially manageable standards for determining who are ministers and priests subject to the Tennessee Constitution, Article IX, Section 1. Who counts as a minister or priest is a *religious* question upon which there are substantial differences among various religious traditions. The spector of entanglement is raised because legislatures and courts could resolve these differences only by reference to *religious* or *theological* norms. A few examples may suffice.[4] (Some of these examples reinforce appellant's vagueness claims at IV, *infra*.)

One of the essential differences between Luther and the Roman Catholic Church turned on the definition and role of the priesthood. In opposition to the hierarchial organization of the Roman Church whose priesthood was legitimated by apostolic succession—the laying on of hands going back to Peter—Luther's concept of the "priesthood of all believers" drew no distinctions between ministers and the laity. Thus, Luther declared that "[a]ll of us who believe in Christ are *priests* and kings in Christ." "The Freedom of a Christian" in MARTIN LUTHER: SELECTIONS FROM HIS WRITINGS 63 (J. Dillenberger, ed. 1961) (emphasis added).

Who counts as a priest or minister is at the crux of the ecumenical movement. If Roman Catholic or Episcopal concepts of apostolic succession are applied, neither appellant nor any other Baptist clerics are, in truth, ministers or priests since they are not participants in the ritual of laying on of hands tracing back to Peter.

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[4] The writer is indebted to Professors Charles Reynolds and Stan Lusby of the University of Tennessee Department of Religious Studies for much of the following "entanglement" argument.

The Book of Mormon which establishes church policy for Mormons places responsibility on the elder males who share church responsibility and authority. Every Mormon —at least, every male Mormon—upon coming of age is expected to enter the "priesthood"—that is, to accept the call to become a missionary for a period of two years.

In the Moslem structure, there are no priests or ministers. Mohammed is regarded as the instrument of God whose ways are made known in the Koran. The faithful have a straight path to the deity. Although there are religious scholars, the precepts of the faith make ministers and spiritual advisors unnecessary.

Among Free Will Baptists one becomes a minister by being called by God. No other requirements or special training are imposed. Are courts capable of deciding who has been "called by God"? *See United States v. Ballard*, 322 U.S. 78 (1944).

Southern Baptists, in contrast, require not only that one be called by God to the ministry but that this call be affirmed by a congregation.

In the "churches of the laity," no special training or education is required of the "preachers." The "preacher" is expected to follow an occupation during the week to earn his living and to preach the word of God on Sunday. In churches of the laity, each member is a potential minister and many different members may serve as preachers from time to time. The church-of-the-laity tendency can be found in more hierarchically organized churches as well. Is a "Catholic worker" priest who is employed on the assembly line or in the fields of "priest" or just a worker for the purposes of the Tennessee Constitution, Article IX, Section 1?

In sum, one must conclude that the drafters of the Tennessee Constitution, Article IX, Section 1, and the majority of the Tennessee Supreme Court in the *McDaniel* case acted within a very narrow, established church frame of reference and understanding. It would be a great mistake for the society to permit the states to exclude ministers and priests from public office because this would inevitably require some agency of the state—executive, legislative or judicial—to resolve religious questions as to who are ministers with regard to which there are substantial religious differences. The Tennessee Constitution, Article IX, Section 1, runs afoul of the teaching of *Everson* that all religions be treated alike despite the Tennessee Supreme Court's liberal construction of the statute. The *McDaniel* opinion of the Tennessee majority does not treat all religions alike because it falsely assumes that all religions and denominations have hierarchical organizations with a clearly dileneated priesthood. This assumption overlooks the rich diversity of this nation's pluralistic religious structure. The principal purpose of the "entanglement test" was to guard against the danger of state involvement in such essentially religious questions as to who are ministers or priests and to prevent the state from favoring or penalizing any religious group because of its peculiar organizational structure or lack thereof.

III.

Appellant contends that the decree of the Tennessee Supreme Court deprives him of fundamental, federally secured rights of voting and political candidacy. *See* F. Le Clercq, "The Emerging Federally Secured Right of Political Participation," 8 IND. L. REV. 607 (1975). Appellant relies upon the authority of *Lubin v. Panish*, 415 U.S. 709 (1974); *Storer v. Brown*, 415 U.S. 724 (1974); *O'Brien v. Skinner*, 414 U.S. 524 (1974); *American Party v. White*, 415 U.S. 767 (1974); *Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Bullock v. Carter*, 405 U.S. 134 (1972); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Jenness v. Fortson*, 403 U.S. 431 (1971); *Turner v. Fouche*, 396 U.S. 346 (1970); *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Evans v. Cornman*, 398 U.S. 419 (1970); *Jenness v. Little*, 306 F.Supp. 925 (N.D. Ga. 1969), *appeal dismissed sub. nom. Matthews v. Little*, 397 U.S. 94 (1970); *Matthews v. Little*, 396 U.S. 1223 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Williams v. Rhodes*, 393 U.S. 23, (1968); *Carrington v. Rash*, 393 U.S. 23 (1968); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Baker v. Carr*, 369 U.S. 186 (1962); *Corfield v. Coryelle*, 6 Fed. Cas. 546 (No. 3230) (C.C. E.C. Pa. 1823)

Voting Rights. An important aspect of the right to vote is the right to vote for the candidate of one's choice. Article IX, Section 1 of the Tennessee Constitution and the 1976 legislative call for a limited constitutional convention dilute appellant's fundamental right to vote for persons of his choice. Since the right to vote is fundamental, state intrusion can not be justified unless necessary to serve a compelling interest. The exclusion

of ministers and priests from candidacy for certain public offices serves no rational purpose. The Article IX exclusion would not satisfy even the rational basis test of *Turner v. Fouche*, *supra*. The exclusion obviously could not survive the far more demanding standard of "strict scrutiny." As a voter, appellant is assured by the Equal Protection Clause of the Fourteenth Amendment that no class of potential candidates for public office will be aribtrarily disqualified. In a democratic society, the voters should determine the officers by whom they are to be governed. The fact that voters may occasionally choose to be represented by clerics—the recent election of Robert Drinnan to the U. S. Congress from Massachusetts comes to mind—is a matter best left to the ballot box than to the legislature or the courts.

The lack of a compelling state interest to support Article IX also arises by inference from its limitation to officers in "either House of the Legislature". Were the state interest truly compelling, it would be difficult to explain how the exclusion does not apply to other important state offices in Tennessee—for example, the office of Governor. *See* Tennessee Constitution, Article III, Section 3.

The majority opinion of the Tennessee Supreme Court conceded that the disqualification of ministers and priests from state legislative office was a "burden on the freedom to act in the governmental sector." *Paty v. McDaniel*, Appendix B, at 10. The burden is impermissible because of the "lack of necessity of this statute as a means of protecting a paramount or compelling state interest." *Paty v. McDaniel*, Appendix B, dissenting opinion, at 5 (Brock, Jr., *dissenting*).

The majority opinion below attempted to justify the exclusion of ministers and priests from legislative office because they "occupy a very special position in our society, and that by virtue of their position, they have an influence upon many of their fellow men, that others cannot exert." *Paty v. McDaniel*, Appendix B, at 14. Brock, J., *dissenting* found "no weight" in that argument but concluded that "even if this were true, it is an advantage which the state has no compelling interest in preventing." *Paty v. McDaniel*, Appendix B, dissenting opinion, at 4. The effort to fence out ministers and priests from candidacy for public office must fail because it is an irrational intrusion upon voter choice. It must fail just as the effort to fence out the military failed in *Carrington*; the efforts to exclude the indigent failed in *Harper*, *Matthews*, *Bullock* and *Lubin*; and the effort to exclude non-property holders failed in *Turner* and *Kolodziejski*.

Rights of Political Candidacy. A federally secured right of political candidacy emerges from the recent cases involving candidacy. Political candidacy is closely related to important rights of association and speech secured by the First Amendment, a fact which has been recognized by the Supreme Court at least since 1968 in *Williams v. Rhodes*, *supra*. The filing fee cases — *Matthews*, *Lubin*, *Bullock* — clearly establish a right of candidacy which can be asserted by candidates *qua* candidates rather than just derivatively by voters.

Reverend McDaniel asks this court to vindicate his fundamental right of political candidacy. The strict scrutiny standard is triggered unless, as is probably the case, the exclusion of ministers from candidacy can not be justified even under the less stringent rational basis standard. The disqualification of ministers and priests

as delegates by Article IX and the 1976 call to the limited constitutional convention fails to pass muster under the Equal Protection Clause because the provision is not necessary to support a compelling state interest. Nothing in *Everson* can fairly be construed "to mean that an official of the state or Federal government, in his capacity as private citizen, is prohibited from participating in religious affairs or that a member or leader of a religious organization is forbidden from participating, as a private citizen, in his state or federal government." *Paty v. McDaniel*, Appendix B, dissenting opinion at 4 (Brock, J., *dissenting*).

IV.

Vagueness. The Tennessee Supreme Court's construction of Article IX, Section 1 of the Tennessee Constitution, *Paty v. McDaniel*, Appendix B, at 18, does not dispose of appellant's vagueness claim. Appellant argued that the constitutional provision disqualifying ministers and priests from legislative office was unconstitutionally vague upon the authority of *Epperson v. Askansas*, 393 U.S. 97, 112 (1968) (Black J., *concurring*) and *NAACP v. Button*, 371 U.S. 415 (1963). *See also Thornhill v. Alabama*, 310 U.S. 88 (1940); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Gooding v. Wilson*, 405 U.S. 518 (1972). The problems of vagueness remain even after the state court's definitive construction of the challenged constitutional provision. The Tennessee majority did not address itself to a number of vexing questions raised by appellant below. Does the disqualification of ministers apply equally to part time or lay ministers? To ordained ministers who are not presently serving a particular congregation? (If Reverend McDaniel resigned his position as pastor of the Second Missionary Baptist Church in Chattanooga, would he not remain a "minister of the gospel" within the meaning of the disqualification?) Many Biblical

references support a broad concept of ministry, in effect, coextensive with the "chosen few" or the "Christian elect." *See*, for example, 2nd *Corinthians* 3:5,6 and *Isaiah* 61:6. How does the Tennessee Constitutional disqualification affect denominations or religions which consider each member a minister? Would anyone speaking at a meeting of the Society of Friends be considered a minister within the scope of the Tennessee constitutional disqualification?[5] Would the disqualification apply to the elders or other formally or informally organized group of church leaders of congregations which have no minister or priest? Could the disqualification be constitutionally applied to such elders without applying it to persons occupying similar roles in other denominations? *See Fowler v. Rhode Island*, 345 U.S. 67 (1953). Does the Tennessee constitutional disqualification apply equally to defrocked ministers or priests? What persons, if any, among Christian Scientists, Ethical Culturists or Buddhists would fall within the disqualification? The opinion of the majority below makes no pretense of addressing these difficult problems, some of which are probably insoluble. Counsel submits that the courts are ill suited to the task of deciding such questions.

V.

Religious Tests as a Qualification for Office. The United States Constitution, Article VI, Clause 3 provides:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States shall be bound by Oath or Affirmation to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

[5] Compare T.C.A. 36-415

The religious test clause clearly applies to candidacy for state legislative office. The purpose of the clause on its face was to bind all federal and state officers to support the Constitution as defined in the immediately preceding supremacy clause. The qualifying phrase "under the United States" no more limits the religious test clause to federal officers than the clause limits the oath to support the Constitution to federal officers. As originally offered by Mr. Pinckney of South Carolina, the Religious Test Clause of the United States Constitution, Article 6, Clause 3, applied to offices "under *the authority of* the United States" 2 Farrand, *Records of the Federal Convention* 468 (1973) (emphasis added). The words, "the authority of" were deleted to assure the applicability of the religious test clause to offices under authority of the states as well as of the United States. The fact that Article VI, Clause 3 of the United States Constitution follows the Supremacy Clause—the most formidable restriction on state authority in the Constitution—reinforces the plausibility of the argument that Article IV, Clause 3, was intended to apply with equal force at the state and federal levels. The Tennessee Constitution, Article IX, Section 1 amounts to a test oath abhorent to our tradition, *Girouard v. United States*, 328 U.S. 61 (1946) and offends the religious test clause of the United States Constitution, Article VI, Clause 3. *See In re Summers*, 325 U.S. 561, 576 (1945) (Black, J., *dissenting*).

Even should the Court decide that the religious test clause as originally adopted did not apply to the states, it is apparent that a right so fundamental has been incorporated by the due process clause of the Fourteenth

Amendment and is now applicable to the states. *Compare Gitlow v. New York*, 268 U.S. 652 (1925).

CONCLUSION

The constitutional questions presented by this appeal are substantial and of great public importance. The case is one of first impression at the federal appellate level. It is respectfully submitted that probable jurisdiction should be noted. The judgment of the Tennessee Court should be reversed both on the merits and as to costs with allowance of attorney fees to appellant. *See* 42 U.S.C. 1976*1*(e).

Because of the imperative public need that the questions presented here be resolved prior to the convening of the limited Constitutional Convention on August 1, 1977, appellant urges that, should the Court note probable jurisdiction, this case be given expedited consideration on the docket.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of this Statement as to Jurisdiction have been served upon The Honorable Brooks McLemore, Attorney General of Tennessee, Kenneth R. Herrell, Assistant Attorney General of Tennessee and Selma Cash Paty, Esq., counsel for appellees in this proceeding by placing same in the United States mail with sufficient postage directed to their respective office addresses on this the 11th day of April, 1977.

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APPENDIX A

SUPREME COURT OF TENNESSEE, AT KNOXVILLE
SEPTEMBER TERM 1976

SELMA CASH PATY (No. 51094)
Vs.
REV. PAUL A. McDANIEL, ET AL
} Hamilton Equity Reversed

DECREE

(Filed March 7, 1977)

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Hamilton County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is error.

It is therefore ordered and decreed by the Court that the decree of the Chancellor be reversed, and that the costs of the cause are adjudged against Appellee, Rev. Paul A. McDaniel, for which let execution issue.

By certified copy of this Order, together with a copy of the Court's Opinion, it is hereby certified to the Governor of the State of Tennessee, the Secretary of State, and the Legislative Body of Hamilton County that a vacancy exists in the office of delegate to the 1977 Tennessee Constitutional Convention from the 29th House District, Hamilton County, by virtue of Reverend Paul McDaniel's ineligibility.

Wm. H. D. Fones, J.
Robert E. Cooper, C.J.
Joseph W. Henry, J.
William J. Harbison, J.

(Certification of Supreme Court Clerk Omitted)

APPENDIX B

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

SELMA CASH PATY, Appellant	)	Hamilton Chancery
VS	)	Honorable Herschel P. Franks, Chancellor
REV. PAUL A. McDANIEL, ET AL., Appellees	)	

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REVERSED WM. H. D. FONES, J.

OPINION

(Filed March 7, 1977)

[2]

The major issue in this case is whether the Tennessee Constitutional provision declaring ministers of the gospel and priests of any denomination whatever, ineligible to a seat in either house of the Legislature, violates the free exercise clause of the First Amendment to the Federal Constitution.

Public Acts 1976, Chapter 848, the Legislative call for a limited constitutional convention, established the qualifications of delegates as the same as those for membership in the House of Representatives, thus invoking Article IX, Section 1 of the Constitution of Tennessee that provides:

> "Section 1. ***Ineligibility of ministers and priests to seats in legislature.*** —Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of souls, and ought not to be diverted from the great duties of their functions; therefore, no Minister of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature."

Appellant, Selma Cash Paty, a candidate for the office of delegate to the 1977 Constitutional Convention from the twenty-ninth (29th) district of Hamilton County, brought this suit to have appellee, Reverend Paul A. McDaniel, an opposing candidate, declared ineligible to serve, and to remove his name from the ballot.

Appellee defends on the grounds that Article IX, Section 1, violates the free exercise and establishment clauses of the First Amendment to the Constitution of the United States, and the equal protection clause of the Fourteenth Amendment.

The Chancellor observed that:

> "The free exercise of religion must include the right to be a minister of the gospel as this is a tenet of the individual's belief."

He held that the exclusion of ministers from public office infringes upon the free exercise of religion guaranteed by the First Amendment and is therefore void.

[3]

Appellant insists that the exclusion of ministers fortifies the doctrine of separation of church and state, is directed against a profession, not the exercise of religion, and that it is a natural and reasonable classification rather than a constitutionally impermissible invidious, arbitrary or capricious one.

In the trial court, appellant called appellee as her witness and established that Reverend McDaniel is pastor of the Second Missionary Baptist Church in Chattanooga; that he considers the ministry to be a profession and one of his many duties as such is to lead people to salvation; that if elected as a delegate to the 1977 Constitutional Convention he would not resign as a minister of the gospel, nor as pastor of the church he now serves. On cross-examination it was established that Reverend McDaniel has a Bachelors Degree in Political Science from Moorehead College, a Masters of Divinity from Colgate-Rochester Divinity School and a Masters in Sociology from the

University of Rochester. Appellee testified that he could carry out his duties as a minister while serving as a delegate to the Constitutional Convention and that he had no knowledge of any objection on the part of his church to his candidacy or service as a delegate.

Upon its first arrival in this Court, the case was remanded to cure the deficiency of failure to make the Attorney General of Tennessee a party. T.C.A. §23-1107, Rule 24.04,

[4]

T.R.C.P., *Cummings v. Beeler*, 189 Tenn. 151, 223 S.W.2d 913 (1949); *Buena Vista Special School District et al. v. Board of Election Commissioners, et al.*, 173 Tenn. 198, 116 S.W.2d 1008 (1938) and *Cummings v. Shipp*, 156 Tenn. 595, 38 S.W.2d 1062 (1928).

Upon remand, the Attorney General waived appearance in the trial court so that an expedited appeal to this Court might result in a decision before election day. That objective proved to be unattainable and he has filed, at the direction of the Court, a brief addressing all of the issues. He joins appellant in urging the constitutionality of Article IX, Section 1.

It has long been the established law that the First Amendment to the United States Constitution is applicable to the States through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

It is, of course, our responsibility to examine the decisions of the United States Supreme Court for principles and guidelines applicable to and determinative of

the issues here, as that Court is the ultimate expounder of the United States Constitution.

But, in our view, we are also required to give weight to the well-established principle that courts must indulge every reasonable presumption of law and fact in favor of the validity of a state's constitutional provision that has been ratified by the people. *Snow v. City of Memphis*, 527 S.W.2d 55 (Tenn. 1975); *Southern Railway Company v. Fowler*, 497 S.W.2d 891 (Tenn. 1973); *People v. Sours*, 31 Colo. 369, 74 P. 167 (1903); *State v. Alderson*, 49 Mont. 387, 142 P. 210 (1914); *Weeks v. Ruff*, 164 S.C. 398, 162 S.E. 450 (1932); *State ex rel. Morgan v. O'Brien*, 134 W.Va. 1, 60 S.E.2d 722 (1948).

[5]

I.

The history of Article IX, Section I reveals that it is identical to Article VIII, Section I of the original Tennessee Constitution, approved in 1796. That constitution was almost totally derived from the 1776 North Carolina Constitution and the 1784 Constitution of the lost State of Franklin. See, *Caldwell, Studies in the Constitutional History of Tennessee*, 77-101 (1907); see also *McClure, State Constitution Making*, 377-460 (1916).

Both North Carolina and Franklin had constitutional provisions prohibiting ministers from participating in government. North Carolina's read:

> "XXI. That no clergyman or preacher of the gospel shall be capable of being a member of either the Senate, House of Commons, or Council of State, while he continues in the exercise of the pastoral function."
>
> *McClure* at 437

The State of Franklin's was identical. *Williams, History of the Lost State of Franklin*, 339 at 345, (1933). The North Carolina Constitution also prohibited "receivers of public monies," "officers in the regular army or navy," "agents supplying the army or navy" and "athiests" as well as other government officials from serving in the legislature. *McClure* at 405.

During our first constitutional convention, an attempt was made to prevent ministers from serving in "any civil or military office or place of trust within this state" as well as the general assembly. *Journal of the 1796 Constitutional Convention*, 18 (1796). The attempt failed, *Id.* at 23. The Constitutional Conventions of 1835 and 1870 were unlimited, and the subject provision was re-adopted by each Convention and ratified by a vote of the

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people of Tennessee. In the one hundred eighty (180) year life span of this constitutional provision no challenge to its validity has reached this Court. It may or may not be of significance that over the entire period of our statehood, no minister or priest has heretofore felt sufficient infringement upon his free exercise of religion, by virtue of ineligibility to serve in the Tennessee Legislature, to litigate the question.

II.

The only reported case our research has disclosed involving the identical issue we face in the case at bar, is *Kirkley v. State of Maryland*, 381 F.Supp. 327 (D. Maryland 1974). The U. S. District Court for the Dis-

trict of Maryland declared unconstitutional Article III, Section 11, of the Constitution of the State of Maryland prohibiting ministers or preachers of the gospel, or of any religious creed or denomination from service as Senator or Delegate. Defendants, the State of Maryland represented by the Governor and the Attorney General, for all intents and purposes, admitted the unconstitutionality of the provision and made no attempt to demonstrate any basis for the exclusion of ministers as State Legislators. The Attorney General of Maryland had issued an opinion expressing the view that the section in question was unconstitutional. He concluded, in part, that its inclusion in the Maryland Constitution was due to "a nineteenth century view of the ministry not particularly complimentary to that calling and not prevalent today." 381 F.Supp. at 331.

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The district judge added, "Another reason, no doubt, was to insure the separation of Church and State." *Id.* But, he observed that there are members of the clergy sitting in the Congress of the United States and in all probability in the legislatures of other states, and concluded that if this exclusion was necessary to insure the proper separation between church and state, the Federal Government would have done so.

The State of Maryland did not appeal from the decision of the district court.

We pause to examine the effect of the exclusion of ministers and priests from service in the legislature. It is not asserted by appellee that service in the General Assembly of Tennessee is a tenet of the Baptist faith, nor are we aware of any religious sect that asserts

that seeking and serving in public office is a religious duty. It is purely a secular activity. But, it is also true that a minister or priest is faced with the choice of abandoning either his leadership role in religion or any hope of serving the people of his district in the State Legislature. We also recognize that there is some validity in describing the effect of Article IX, Section 1, as prohibiting legislative service because of a person's leadership role in a religious faith.

But the question may well be asked, does it in fact impede the free exercise of religion? Those who believe that all religious leaders should devote their entire time to ecclesiasticism will insist that no true religious leader would be deterred from accepting or retaining that role, because of exclusion from state legislative service; that religious

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leaders entering the political arena as candidates for public office, and their service in public office, would be detrimental and degrading to all religions and represent the ultimate violation of the admonition "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's."[1] They would conclude that, at most, the Article constitutes a *de minimus* theoretical impediment to religion.

On the other hand, many would answer that it is a direct affront to all religion to disqualify the entire leadership of every religious sect from service in the state legislature and represents the ultimate in governmental interference with religion.

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[1] Matthew 22:21.

All rhetoric aside, the subject provision simply does not impose any burden, direct or indirect upon religious belief or religious action. It is not religious belief, but the career or calling, by which one is identified as dedicated to the full time promotion of the religious objectives of a particular religious sect, that disqualifies. Ineligibility for service in the General Assembly in no way restricts religious action—except in the law making process of government—where religious action is absolutely prohibited by the establishment clause, as we read the decisions of the United States Supreme Court.

In *Everson v. Board of Education of Ewing TP.*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1948), the Supreme Court said:

> "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."

330 U.S. at 16.

[9]

Every First Amendment case with which we are familiar has involved governmental action said to interfere with religion or tend to favor one religion over another or favor all religious persons over non-religious persons. This case is unique, but clearly the above quoted sentence from *Everson* prohibits religious participation in the affairs of government to the identical extent that it prohibits governmental participation in religion. Parenthetically, a valid argument might be advanced that the case at bar is analogous to and the validity of our constitutional provision is supported by the decision in

Illinois ex rel McCollum v. Board of Education, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 461 (1948), where utilization of tax supported public schools in aid of religious instruction was held to violate the establishment clause. The effect of the factual situation in *McCollum* may be said to have constituted religious interference with governmentally established secular institutions to promote religious goals. Of significance to the case at bar, the Court said:

> "For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aim if each is left free from the other within its respective sphere. Or, as we said in the *Everson* case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable."

333 U.S. at 212.

There is another consideration that, it seems to us, has significance on the issue under consideration. We can take judicial notice of the fact that Baptists, Methodists and Catholics separately and collectively, far outnumber other religious sects, both separately and collectively. Opening the

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door to service in the General Assembly by ministers and priests would grant a distinct advantage to ministers and priests of the three mentioned religions, over those of all other sects, because of the far more extensive voter base from which to launch a campaign for office. Also, political campaigns by ministers would naturally tend to pit religion against non-religion. The potentially

"divisive forces" considered significant in numerous First Amendment decisions of the Supreme Court are clearly present in sanctioning the candidacy of ministers and priests for legislative service.

We do not agree with appellee that the subject prohibition encroaches upon the freedom of belief of ministers and priests. We, of course, recognize the oft repeated interpretation that the First Amendment embraces two concepts—freedom to believe and freedom to act. "The first is absolute, but, in the nature of things, the second cannot be." *Cantrell v. Connecticut*, 310 U.S. 296 at 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

In our view, if any encroachment results from the ineligibility of ministers and priests to serve in the General Assembly of Tennessee it is an indirect burden on the freedom to act in the governmental sector. There the freedom of ministers and priests to act necessarily breaches the wall between church and state and collides with the establishment clause.

We are persuaded that *Braunfeld v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961), is sufficiently analogous to the case at bar to control its disposition. In

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Braunfeld, the Court sustained a Sunday closing law even though conceding that it undoubtedly served to make the practice of religious beliefs of Orthodox Jewish merchants more expensive. A distinction was made between legislation that imposes only an indirect burden on the exercise of religion, and legislation that attempts to make a religious practice itself, unlawful.

As members of the Orthodox Jewish faith, appellants were required by their religious beliefs to close their places of business from nightfall each Friday until nightfall each Saturday. They alleged, and their allegations were assumed to be true, as the case was before the Court on a motion to dismiss, that the Sunday closing law forced them to make a choice between giving up their Sabbath observance, a basic tenet of their religious beliefs, or suffer serious economic loss. They also asserted that the statute would hinder the Orthodox Jewish faith in gaining new adherents, subjecting their religion to discriminatory treatment in violation of the free exercise clause of the First Amendment. Appellant Braunfeld, alleged that he would be forced out of business and would lose his capital investment if he could not open on Sunday.

In analyzing the effect of the Sunday closing law the Court observed that the statute did not make unlawful any religious practices of appellants[2] or force them to say or

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believe anything in conflict with their religious tenets.[3]

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[2] In contrast with **Reynolds v. U. S.**, 98 U.S. 145, 25 L.Ed. 244 (1879), where a statute prohibiting polygamy collided with Mormon belief in duty of males to practice polygamy; and **Prince v. Commonwealth of Massachusetts**, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1943), where statute prohibiting sale of periodicals etc., in public places by girls under eighteen years of age collided with the Jehovah's Witness belief that it was a religious duty to perform such work.

[3] As in **West Virginia Board of Education v. Barnette**, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) where state action required school children to salute the flag, action contrary to the religious beliefs of appellees therein. The state action was invalidated with strong emphasis upon the fact that appellee's religious belief did not collide with rights asserted by any other individual.

". . . the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. Furthermore, the law's effect does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sunday. And even these are not faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution. Fully recognizing that the alternatives open to appellants and others similarly situated —retaining their present occupations and incurring economic disadvantage or engaging in some other commercial activity which does not call for either Saturday or Sunday labor—may well result in some financial sacrifice in order to observe their religious beliefs, ***still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful.***" (Emphasis added)

366 U.S. at 605, 606.

Having concluded that the effect of the Sunday closing law upon appellants was the mere imposition of an indirect burden on the exercise of religion the Court continued:

> "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature.
>
> . . . .
>
> . . . if the State regulates conduct by enacting a general law within its power, the purpose and

> effect of which is to advance the State's secular goals, the
>
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>
> statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden. See Cantwell v. Connecticut, supra (310 US at pp. 304, 305)."

366 U.S. at 606, 607.

The Court found that Pennsylvania was justified in setting aside one day of the week as a day of rest, repose, recreation and tranquility; that it was beneficial to the public welfare to do so. Alternatives to designating Sunday as the single day of rest and exempting Sabbatarians were rejected as undermining the State's goal of providing a single day of rest.

The effect of Tennessee's constitutional provision prohibiting service in the General Assembly is to advance the State's goal of maintaining the separation between church and state, an imperative, constitutionally equal to the free exercise mandate. In our opinion, it is far higher on the scale of legitimate state goals than the mere convenience of having everyone rest on the same day, which sufficed in *Braunfeld*. If any burden can be said to be imposed upon the exercise of religion, it is indirect, minuscule, and does not make unlawful any religious practice. In all respects, the prohibition in the case at bar is upon firmer constitutional grounds than the Sunday closing law, sustained in *Braunfeld*.

But, the record in the case at bar contains neither facts, nor expert testimony to assist the Court in assessing the effect that voiding Article IX, Section 1 of our Constitution would have in breaching the wall between church and state. Appellant directs our attention to the not insignificant number

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of laws dealing with ministers as an occupation and generally conferring special privileges upon them as a class. Examples noted are their exclusion from the draft by the Selective Service Act of 1967, exclusion from jury service in Tennessee, the confidential communications statutes of this State and particular sections of the Internal Revenue Code all of which appellant implicitly asserts give ministers and priests special treatment. We are unable to perceive that any of the special legislation cited in appellant's brief dealing with ministers as an occupation provides any direct evidence in support of the allegations that their service in the State Legislature would violate the establishment clause of the First Amendment. However, such legislation does emphasize that ministers and priests occupy a very special position in our society, and that by virtue of their position, they have an influence upon many of their fellow men, that others cannot exert.

It seems to us that it can fairly be said, in affirmative support of appellant's position, that ministers and priests could be expected, if and when serving in the Legislature, to do everything within their professional and spiritual powers of persuasion to further the aims of religion by sponsoring, advocating and voting for legislation that could or might violate both the free exercise and establishment clauses of the First Amendment; that

without regard to the degree of success they might achieve, such activity would constitute a divisive force sufficient to constitute a significant violation of the Doctrine of Separation of church and state; that history will reflect that all governmental action that has been condemned by the First Amendment and the judicial decisions interpreting same

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has been sponsored and enacted by religiously motivated members of the legislature in direct response to the leadership of religious sects; that the effectiveness of that religious leadership in the governmental sector would be greatly enhanced by the presence in the State's highest deliberative bodies of ministers and priests. The present day religious wars in Ireland and Lebanon, that shook the conscience of all men of good will, everywhere, religious and non-religious, remind us that the human race has not advanced to a degree of civilization that will permit us to conclude that the fervor of religion will never again disturb and disrupt secular affairs and government. Out of its proper realm it is a force of awesome power and influence upon human conduct.

The later case of *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), is similar in some respects to *Braunfeld*, and a different result was reached. However, the distinctions are clear and apparently represents no erosion of the *Braunfeld* decision.

In *Sherbert* appellant's religion prohibited Saturday labor. The textile mill where she had worked five days a week for two years, changed all three shifts to a six day week. She was unable to find other employment,

because of their unwillingness to depart from a basic tenet of the Seventh Day Adventist creed. Her application for unemployment compensation benefits was denied on the grounds that she had failed without good cause to accept suitable work. That ruling was sustained by the courts of South Carolina and reversed by the Supreme Court. The effect of South Carolina's action was analyzed as follows:

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> "For '[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.' Braunfeld v. Brown, supra, 366 U.S., at 607, 81 S.Ct., at 1148. Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakeable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."
>
> 374 U.S. at 404.

No compelling state interest to justify the infringement upon appellant's First Amendment right was asserted and proven to exist. The possibility that fraudulent claims

by insincere claimants would dilute the fund and hinder scheduling by employers of necessary Saturday work was rejected, having been asserted for the first time in the Supreme Court and there being no supportive evidence in the record. The Court also expressed doubt that these asserted interests could be shown to be sufficiently compelling to justify a First Amendment infringement.

The Court distinguishing *Sherbert* from *Braunfeld*, said:

> "In these respects, then, the state interest asserted in the present case is wholly dissimilar to the interests which were found to justify the less direct burden upon religious practices in Braunfeld v. Brown, supra. The Court recognized that the Sunday closing law which that decision sustained undoubtedly served 'to make the practice of [the Orthodox Jewish merchants'] religious beliefs more expensive,' 366 U.S., at 605, 81

[17]

> S.Ct., at 1147. But the statute was nevertheless saved by a countervailing factor which finds no equivalent in the instant case—a strong state interest in providing one uniform day of rest for all workers."
>
> 374 U.S. at 408.

Appellee insists that his free exercise claim is closely akin to the question presented in *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961). Torcaso was refused a commission as notary public because he would not declare his belief in God. The Maryland Constitution provided that no religious test be

required for any office, except a declaration of belief in the existence of God. The Court said that the test oath is abhorent to our tradition and that neither a state nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." In our opinion, Article IX, Section 1 does not have the effect of forcing ministers and priests to profess a belief or disbelief in any religion. The test oath clearly intruded upon the freedom to believe or to disbelieve, and no state interest to justify its imposition was, or could be asserted.

Appellee also relies upon *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), and *West Virginia State Board of Education v. Barnette*, *supra* footnote 3, as involving constitutionally protected religious belief and action, comparable with his situation. In both cases the Supreme Court invalidated state action requirements that directly interferred with religious beliefs. In our opinion, the cases are inapposite.

We conclude that Article IX, Section 1, Constitution of Tennessee, does not infringe upon religious belief or

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religious action within the protection of the free exercise clause; that such indirect burden as may be imposed upon ministers and priests by excluding them from the law-making process of government is justified by the compelling state interest in maintaining the wall of separation between church and state.

III.

Appellee argues that Article IX, Section 1 amounts to an establishment of religion, in violation of the First and Fourteenth Amendments of the United States Constitution. This argument is predicated on the assumption that the provision applies only to ministers and priests of the Christian faith; that it was originally intended as a preference or benefit protecting them from diversion from the "great duties" of the pastoral function.

We disagree with that interpretation.

The word "priest" is defined in Webster's Third New International Dictionary, p. 1799-1800 (1971) as: "1: one who performs sacrificial, ritualistic, mediatorial, interpretative, or ministerial functions esp. as an authorized or ordained religious functionary or official minister of a particular religion."; and in the American Heritage Distionary Of The English Language, p. 1039 (1970) as: "2. A minister in a non-Christian religion. 3. One whose role is considered comparable to that of a priest."

We hold that the phrase ". . . priests of any denomination whatever" is intended to embrace the counterparts of ministers, priests and rabbis in every religion sect, whatever

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may be their title or designation.

The disposition we make of appellee's establishment clause contention also disposes of his assertion that Article IX, Section 1 is unconstitutionally vague.

IV.

Appellee's last federal constitutional contention is that Article IX, Section 1 amounts to state discrimination against himself and other ministers who wish to serve as delegates to the 1977 Constitutional Convention. We again disagree. The equal protection clause does not strike down every difference in the application of laws but rather is concerned with "invidious distinctions." *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968). We do not find that the disqualification of ministers from seats in the Legislature amounts to such a distinction.

The United States Supreme Court has created two (2) tests for normally determining whether or not a particular state action violates the equal protection clause. In order to determine which test to apply the Court looks at: "the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." *Dunn v. Blumstein*, 405 U.S. 330, 335, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). If a state law or action makes a classification that infringes on a "constitutionally protected right" it must show a "compelling state interest" for that classification or it is unconstitutional. *Id.* at 339. However, if a non-fundamental right is in question, the state need only demonstrate that the classification is

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reasonably related to a premissible state interest. *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). Both parties rely on these tests in their opposing positions on the constitutionality

of Article IX, Section 1. But, in *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972) the Supreme Court has articulated a third test that we believe to be applicable here. The Court was faced with which standard should be applied to a state filing fee which could prevent poor persons from holding public office. The Court determined that a test more rigid than merely "a rational basis" but not seemingly as strict as requiring "a compelling state interest" should be applied. Chief Justice Burger spelled out the test that would be employed to evaluate classifications that infringed on the right to seek and hold public office:

> ". . . the law must be closely scrutinized and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster."
>
> 405 U.S. at 144.

Our examination of both Article IX, Section 1 and its legislative history reveals that the state's objective was and always has been to insure separation of church and state. While we are of the opinion that a compelling state interest undergirds Article IX, Section 1, the legitimacy of its objective is beyond question. We reject the contention that the subject article violates the equal protection clause of the Fourteenth Amendment.

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V.

Although the disposition we make of this case does not require that we address appellant's second assignment of error, we deem it appropriate to do so, because of its relevance if the ultimate result is contra.

The learned Chancellor decreed:

"That the portion of Section 4 of Chapter 848 of the Public Acts of Tennessee, 1976, which reads, '. . . who can qualify for membership in the House of Representatives of the General Assembly . . .', be and it hereby is declared to be in violation of the requirements of the First Amendment of the Federal Constitution.

That the requirements for the office of delegate to the 1977 Tennessee Constitutional Convention be and they hereby are declared to be determined by the general statutes on qualifications for office-holders, as set forth in the Code of Tennessee."

Appellant asserts that if Article IX, Section 1 is unconstitutional the remaining qualifications and disqualifications for membership in the House of Representatives of the General Assembly of Tennessee should control rather than the general statutes on qualifications for state offices. We also sustain appellant's second assignment of error.

There are significant distinctions between the qualifications for membership in the House of Representatives and those prescribed in the general statutes applicable to offices under the authority of this State, not otherwise specifically provided.[4]

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[4] See, Tennessee Constitution Article 2, §§9, 10, 25 and 26; Article 6, §7; Article 9, §1, Article 10, §3 and T.C.A. §§8-1801, 1803; §39-3219 and §40-2714.

[22]

Section 11 of Chapter 848, Public Acts of 1976 is an all inclusive rescue or savings clause. No extensive analysis is required of the doctrine of elision as applied in this State to support our conclusion that if the unconstitutionality of Article IX, Section 1 be conceeded, that single disqualification should be elided and the remaining qualifications and disqualifications for membership in the House of Representatives govern the eligibility of delegates to the 1977 limited constitutional convention. *See*, *Carr v. State ex rel Armour*, 196 Tenn. 256, 265 S.W.2d 556 (1954), *Davidson County v. Elrod*, 191 Tenn. 109, 232 S.W.2d 1 (1950); and *State v. Dunn*, 496 S.W.2d 480 (Tenn. 1973).

VI.

Reverend McDaniel filed a counter-complaint, cross-complaint and third party complaint on October 21, 1976, following this Court's remand of the first appeal. The action was brought on behalf of himself and all other ministers of the gospel, all priests of any denomination whatever, present and future, (1) who wish to seek election as delegates to the 1977 constitutional convention or any future constitutional convention and (2) who wish to seek election as members of either body of the General Assembly of this State; and as a class action on behalf of himself and all independent voters who (1) wish to vote for delegates to the 1977 limited constitutional convention and all future constitutional conventions, (2) who wish to vote for candidates for election as members of the House or Senate and (3) who wish to vote for ministers of the gospel or priests of any denomination whatever in the November 2, 1976, election or any future election

to a constitutional

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convention or to both bodies of the General Assembly of this State.

The Chancellor, having declared Article IX, Section 1 unconstitutional, granted the relief sought by Reverend McDaniel and all persons similarly situated composing the class of ministers of the gospel and priests of any denomination whatever who are candidates to serve as delegates to the 1977 limited constitutional convention and denied all other relief sought.

Reverend McDaniel appeals from the failure to grant relief to the other classes of persons described above.

We overrule all of the assignments of error relied upon by Reverend McDaniel. The Chancellor correctly held in his memorandum opinion that the issues raised on behalf of said classes do not present justicable controversies under the declaratory judgment statute because they are abstract, theoretical and based upon contingencies which may not arise. *Story v. Walker*, 218 Tenn. 605, 404 S.W.2d 803 (1966).

We hold that Article IX, Section 1, Constitution of Tennessee is free of Federal Constitutional infirmities. The result is that appellee, Reverend Paul McDaniel, a minister of the gospel, is ineligible to serve as delegate to the 1977 limited constitutional convention. He was the successful candidate in the November 2, 1976, election for delegate from the 29th District, Hamilton County, Tennessee. Section 6, Chapter 848, Public Acts of 1976 provides that any vacancy in the membership of the con-

vention from any representative district shall be filled by election of a qualified delegate by the legislative body of the county of residence of the

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delegate whose seat becomes vacant.

The judgment of the Chancery Court of Hamilton County, Tennessee, is reversed. The clerk of this Court will issue an order certifying to the Governor, the Secretary of State, and the legislative body of Hamilton County that a vacancy exists in the 29th House District, Hamilton County, by virtue of Reverend Paul McDaniel's ineligibility. Costs are adjudged against appellee.

/s/ WM. H. D. FONES
Wm. H. D. Fones,

Concur:

Cooper, C.J.
Henry, Harbison, JJ.

Brock, J., dissents (see separate opinion)

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

SELMA CASH PATY, Appellant,	)	Hamilton Chancery
V.	)	Hon. Herschel P. Franks,
REV. PAUL A. McDANIEL, ET AL., Appellees.	)	Chancellor

DISSENTING OPINION

I dissent from the decision and opinion of the majority.

In my opinion, Chapter 848, Public Acts of 1976,[1] insofar as it declares ministers of the gospel and priests of any denomination ineligible to serve as delegates to the Constitutional Convention of 1977, is violative of the (1) "free exercise" guaranties of the First Amendment to the Constitution of the United States[2] and Article 1, Sec. 3, Constitution of Tennessee and (2) the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

[2]

I cannot agree with the conclusion of the majority that ". . . the subject provision simply does not impose any

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[1] The majority opinion speaks, throughout, as if we were determining the validity under the U.S. Constitution of Art. IX, Section 1, Constitution of Tennessee. For the sake of clarity, I will speak only in terms of the statute before us.

[2] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ."

burden, direct or indirect upon religious belief or religious action." It is my view that the statute does, indeed, substantially and directly prohibit the free exercise of religion by the appellee and that no reason, consistent with the First Amendment, can be advanced to justify the prohibition.

The statute clearly prohibits a minister, who is otherwise qualified, from serving as a delegate in the Constitutional Convention of 1977. Thus, the appellee, who desires to be both a minister and a delegate, must purchase the right to be a delegate by giving up his right to continue to be a minister. The disqualification imposed upon the appellee is as much a burden, a penalty, as would be a fine or imprisonment imposed upon him for being a minister. It forces the appellee to make a choice between his right to be a minister and his right to participate in his state government as a delegate to the Constitutional Convention, both of which rights are, in my opinion, guaranteed by the First and Fourteenth Amendments. Thus, the statute confronts the appellee with the necessity of making the kind of choice which the Supreme Court held to be impermissible in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). In that case the South Carolina statute forced the citizen to choose between her right to receive unemployment benefits and her right to practice her religion by keeping Saturday as the Sabbath. Pertinent here is the following statement of the Court:

[3]

> "The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the other hand, and abandoning one of the precepts

> of her religion in order to accept work, on the other hand. Government imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." 374 U.S. at 404.

But, does being a minister constitute an exercise of religion protected by the First Amendment? I should have thought that there could be no question that it does. However, the majority dispute that conclusion. It is not denied that one who performs the customary functions of a minister is exercising his religion, but it is asserted that one dedicated to such service may, because of that dedication, be barred from serving as a constitutional convention delegate, as a necessary means of maintaining "the separation of Church and State."

Such necessity is not evident to me. The national government and the 49 other states get along very well without such a disqualification of ministers. The First Amendment merely prohibits *laws* respecting the establishment of religion by government and *laws* which would prohibit the free exercise of religion; it does not require the "separation of Church and State" in all other respects. *Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952). Particularly, it does not, in my view, prohibit a religious leader from participating in his government upon the same terms as other citizens, nor a government official from taking an active, even a leadership, role in a religious organization.

I think that the majority has misinterpreted and misapplied the decision in *Everson v. Board of Education of Ewing TP.*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

[4]

I have no quarrel with the quotation from that opinion that:

> "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and vice versa." 330 U.S. at 16.

However, I do not understand that statement to mean that an official of State or Federal government, in his capacity as a private citizen, is prohibited from participating in religious affairs or that a member or leader of a religious organization is forbidden from participating, as a private citizen, in his State or Federal government. To the best of my knowledge, the decision of the Court today is the first to hold to the contrary.

No doubt, Tennessee is free to go further in its efforts to insure "the separation of Church and State" than the First Amendment has gone; but, clearly it is circumscribed in that endeavor by the strictures of the First and Fourteenth Amendments. These Amendments require that a law which would restrict, diminish or burden the right to freely exercise one's religion can be justified only by "the gravest abuses, endangering paramount interests." *Sherbert v. Verner*, *supra* at 406; *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430 (1945).

In my view, the majority opinion advances no such justification for this statute. I find no weight in the argument that ministers, as candidates and as delegates, would have an undue advantage over other candidates and delegates, but even if this were true, it is an advantage which the State has no compelling interest in preventing.

Nor do I agree that the disqualification imposed by this statute is a necessary means of maintaining permissible

[5]

"separation of Church and State," of preventing "an establishment of religion." If the appellee should persuade a majority of his fellow delegates to propose an amendment to the Constitution which would infringe upon religious liberty and if the electorate of the state should ratify such amendment, still the courts of this state and the federal courts would stand ready, willing and able to strike it down before any harm could occur.

Finally, the fear that religious strife would be fomented by the candidacy of ministers is equally unpersuasive. I am not aware of any basis for such a fear.

The same lack of necessity for this statute as a means of protecting a paramount or compelling state interest which causes it to fail when tested by the First Amendment likewise compels the conclusion that it invidiously discriminates against ministers and, thus, violates appellee's right to equal protection of the law under the Fourteenth Amendment. See *In Re Summers*, 325 U.S. 561, 65 S.Ct. 1307, 89 L.Ed. 1795 (1945); *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 69 (1968). No excuse, other than those hereinabove found to be wanting, is offered for denying to ministers the right to serve as delegates to the Constitutional Convention of 1977.

I would hold that this statute fails to pass muster under both the First and Fourteenth Amendments and affirm the decree of the Chancellor.

/s/ Ray L. Brock
BROCK, J.

APPENDIX C

IN THE CHANCERY COURT OF
HAMILTON COUNTY, TENNESSEE, PART 2

SELMA CASH PATY	:	
VS.	:	NO. 51094
REV. PAUL A. McDANIEL, ET AL	:	

CHANCELLOR'S MEMORANDUM OPINION

(Filed October 5, 1976)

Plaintiff and Defendant have qualified as candidates at the State Constitutional Convention from the 29th District with the Hamilton Election Commission. Plaintiff seeks a declaratory judgment declaring the defendant ineligible to serve as a delegate to the Convention if elected.

The facts are undisputed and admitted in the pleading. The Defendant is a minister of the gospel within the meaning of the term as used describing qualifications of candidates for delegates to the Constitutional Convention.

The Legislature enacted a call for the Constitutional Convention which is published as Public Act 848. Section 4 of that Act established the qualifications of would-be candidates for delegates to the Constitutional Convention. The yardstick utilized by the Legislature is that the candidates for delegates shall be the same as for membership in the General Assembly. The Constitution of the State of Tennessee, Article IX, declares ministers of the gospel to be ineligible to sit in either house of the Legislature. The State law as written is clear to the effect that the Defendant is not eligible to serve as a delegate to the

Constitutional Convention if elected. The Defendant raises three defenses which will be discussed in the order raised. The Defendant contends that this Court is without jurisdiction to determine the issue, that the jurisdiction is vested exclusively in the delegates to the Constitutional Convention. This apparently was the law in Tennessee until 1974 when the Supreme Court decided a case of *Commer v. Ashe, et al*, 514 SW2d 730. The Supreme Court in that case held that prior to election day, courts of the State have jurisdiction and authority to determine the eligibility

[2]

of candidates; that is, whether the candidate is qualified to have his name appear on the ballot. The second defense contends that the complaint was not timely filed and that the parties cannot exhaust their legal remedies prior to the election on November 2. The Court feels this contention is without merit since both parties are in the same position insofar as any appellate reviews are concerned and the courts must remain open to a redress of any grievance brought with the right to the ultimate determination by appellate courts.

Finally, the Defendant attacks the constitutionality of 1976 Public Acts, Chapter 848, Section 4. This Court holds that under said Section 4 the legislative requirement that candidates for delegates to the Constitutional Convention must possess the same qualifications as that required for membership in the House of Representatives of the General Assembly is unconstitutional under the Federal constitution.

Ministers of the gospel and priests have been disqualified as a class in serving as delegates to the Constitutional Convention and a classification based upon exercise of rights is guaranteed against state infringement by the U. S. Constitution. A state may not deny to some the privileges of holding public office that it extends to others on the basis of distinction that violates Federal constitution guaranties. See *Turner v. Fouche*, 90 Supreme Court 532, at 541. The First Amendment to the U. S. Constitution provides in part: "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof*; . . ." (Emphasis supplied) The Fourteenth Amendment has rendered the legislators of the several states as incompetent as the congress to enact such laws. See *Cantwell v. State of Connecticut*, 60 Supreme Court 900, at 903.

The States limitations upon the right to run for public office place burdens on two different classes of rights. The right of the individuals to associate for the advancement of political belief and the right of the voters regardless of their political persuasion to cast their votes effectively. "Both of these rights, of course, rank among our most precious freedoms". *Williams v. Rhodes*, 89 Supreme Court 5, at page 10.

[3]

The Legislature has in effect denied the Defendant the right to qualify as a candidate on the sole basis that he is a minister of the gospel. The free exercise of religion must include the right to be a minister of the gospel as this is a tenet of the individuals religious belief. By freely exercising a religious belief, the Defendant is penalized at law and such requirement produces

a chilling effect upon the free exercise of religion, a constitutional right guaranteed by the First Amendment and is an infringement on the free exercise of religion by the individual.

A decree will be entered declaring the qualificational requirements in the aforementioned Section 4 of Chapter 848 as unconstitutional under the Federal constitution and the requirements for office of delegate is the general statutes on qualifications for office holders as set forth in the Code of the State of Tennessee.

The costs of the cause will be adjudged equally between the Plaintiff and the Defendant candidates since the Court's determination is mutually beneficial to the parties. Solicitor for the defendant shall submit an appropriate decree.

/s/ HERSCHEL P. FRANKS
CHANCELLOR - PART 2

APPENDIX D

IN THE CHANCERY COURT, PART 2,
FOR HAMILTON COUNTY, TENNESSEE

SELMA CASH PATY	)	
	)	
-vs-	)	NO. 51094
	)	
REV. PAUL A. McDANIEL, et als.	)	

MEMORANDUM OPINION

(Filed October 22, 1976)

This Court on October 6, 1976 entered a Final Judgment in this cause and granted an immediate appeal to the Supreme Court of Tennessee, and that Court entered an Order of Remand on October 15, 1976, declaring that this Court's invalidating the qualification provisions of Chapter 848, Section 4, Public Acts of 1976, on constitutional grounds is of no force and effect, on the ground that the Attorney General of this State was not made a party or served with a copy of the proceedings, since the constitutionality of an act of the Legislature was before the Court on a declaratory judgment action.

At the outset it should be noted that the call for the Convention by the Legislature was not exercising legislative authority (Article 2, Section 3, Constitution of Tennessee) but was acting as a special agency under constitutional powers found in Article 11, Section 3, Paragraph 2, of said Constitution. This distinction is clearly delineated in the case of *West vs. Carr*, 212 Tenn. 367, 370 S.W.2d 469, wherein the Supreme Court said, at page 377:

"The Constitution of Tennessee recognizes the fundamental difference between the power of its General Assembly to take final action—i. e., *to make law*—and the narrowly limited power of a constitutional convention to propose changes for submission to a vote of the people. It does this by making totally different provisions for the membership or composition of the two different bodies."

[2]

Again quoting from the same Opinion, at page 378, the Court quoted its earlier case of *Cummings v. Beeler*, 189 Tenn. 151, 223 S.W.2d 913, with approval, as follows:

"The power to 'alter, reform or abolish' the Tennessee Constitution resides in the people, not in the Legislature. The people are possessed with ultimate sovereignty and are the source of all State authority. The people have the ultimate power to control and alter their Constitution, subject only to such limitations and restraints as may be imposed by the Constitution of the United States."

The issue in the original case, therefore, is not controlled by the limitations of the Constitution of the State of Tennessee, but whatever the people do in this regard is only limited by the restraints of the federal Constitution.

Upon the remand, the Attorney General of the State of Tennessee filed a Waiver and Acknowledgement in this cause on October 19, 1976, acknowledging copies of all pleadings and waiving service of process and the right to be heard or participate in these proceedings.

By Order of the Court defendant McDaniel was permitted on October 21, 1976 to file a Cross-Complaint and Third-Party Complaint in this cause against the original plaintiff, the Governor, the Attorney General, the Secretary of State, the Coordinator of Elections and the members of the State and County Election Commissions, seeking in his own right a declaratory judgment on the issues raised by the Cross-Complaint. The Court has heretofore by Order sustained this Cross-Complaint as a class action, and the original plaintiff and counter-defendant has filed an Answer, and the other mentioned parties have all accepted service of process and waived any required statutory notices and the right to participate and be heard in this Court on the issues raised in this cause. The plaintiff and counter-defendant and defendant and counter-plaintiff, parties to the original action, have filed a Stipulation that they do not wish to introduce any further proof in this cause and agree that the Court may render a final judgment upon the entire record before the Court at this time, including the factual Stipulation.

In effect, both candidates for delegate to the Constitutional Convention are now seeking a declaration by this Court as to whether or not Paul A. McDaniel is an eligible candidate for election as a delegate from the 29th Legislative District to the 1977 Tennessee Constitutional Convention. The Court is of the

[3]

opinion that this issue is proper for determination and reaffirms the reasoning in its prior Memorandum Opinion and incorporates by reference so much of that Opinion as relates to this precise issue.

The argument that the Legislature prohibits a minister of the gospel from participating as a delegate in a Constitutional Convention as an extension of the doctrine of separation of church and state and is fraught with danger, as can be shown by carrying to its logical extreme, that is, the passage of an enactment that would bar any religious person from serving in the representative capacity of a delegate to a Constitutional Convention. Under this reasoning, there would be total separation of religious influence on formulating the State's Constitutional provisions. This Court rejects this theory out of hand as being a specious argument. There is an important and Constitutionally sanctioned distinction between making laws effecting an establishment of a religion or prohibiting the free exercise thereof and the proposing of constitutional provisions by a body composed of persons professing strong religious convictions.

McDaniel seeks a further declaration by this Court that ministers of the gospel are eligible to serve as delegates to future Constitutional Conventions and that ministers of the gospel are eligible to serve in the future as members of the Tennessee General Assembly. He alleges "*he may be a candidate for election* as a delegate in future elections for delegates to a subsequent constitutional convention as well as a candidate for election as a member of the Tennessee House of Representatives or Senate in future elections" (emphasis supplied). In this connection the Tennessee Constitution restricts its amendment to not more often than once every six years. It is speculative and conjectural when and if again there will be a Constitutional Convention, and it is even more speculative as to whether the General Assembly in such a call would attempt to prevent ministers of the gospel from serving

as delegates. It is again alleged that McDaniel may be a candidate for the General Assembly. There is no statement that he intends to be, and, moreover, the record does not show that the issue raised by the pleading is capable of repetition, yet evading review by the Courts, which is the standard established for class action review. The Courts remain open to redress real controversies when they arise and are capable of resolving these speculative issues, should a real controversy develop. The Supreme Court, speaking in the

[4]

case of *Story vs. Walker*, 218 Tenn. 605, 404 S.W.2d 803, prescribes the scope of the declaratory judgment statute, at page 607, as follows:

> "'The policy of this Court, as several times declared, is that its discretion in rendering decrees under the authority of our Uniform Declaratory Judgment Act, Code, sec. 8835 et seq. "should be exercised with the utmost caution." *Newsum v. Interstate Realty Co.*, 152 Tenn. 302, 278 S.W. 56, 57, *Hinchman v. City Water Co.*, 179 Tenn. 545, 167 S.W.2d 986. Otherwise, the courts might be well projected into the "limitless field of advisory judgments.'
>
> Pursuant to that declared policy, this Couft has consistently refused a declaratory judgment where the question presented is abstract, theoretical or based upon a contingency which may or may not arise."

The Court holds that these issues raised by McDaniel are not justiciable controversies under the declaratory

judgment statute. The Court will enter a Decree, declaring the following part of Section 4 of Chapter 848 of the Public Acts of 1976 in violation of the requirements of the First Amendment of the federal Constitution:

> ". . . who can qualify for membership in the House of Representatives of the General Assembly . . ."

and declaring the requirements for the office of delegate to be determined by the general statutes on qualifications for office-holders, as set forth in the Code of Tennessee. The candidate, Paul A. McDaniel, is declared eligible to be a candidate and to serve as a delegate, if elected by the voters, and all other persons similarly situated composing this class. The remaining issues raised in the pleadings, including the prayer for injunctive relief, will in all things be dismissed. An immediate appeal will be granted to the Supreme Court of the State of Tennessee to any aggrieved party. Solicitors for McDaniel shall present a Decree consistent with this Memorandum, with costs equally adjudged against Paty and McDaniel.

/s/ HERSCHEL P. FRANKS
Chancellor - Part 2

APPENDIX E

TO THE HONORABLE CHANCELLORS
OF THE CHANCERY COURT
OF HAMILTON COUNTY, TENNESSEE

SELMA CASH PATY, A resident of Hamilton County, Tennessee
PLAINTIFF

versus

REV. PAUL A. McDANIEL, TOM MOORE, JR., Registrar at Large, CHARLES W. HINSON, JAMES W. PENLEY, ALBERT W. SECOR, MRS. TOMMIE CARTER, and CLAUDED CLARK, JR., all members of the Hamilton County Election Commission, and all residents of Hamilton County, Tennessee
DEFENDANTS

DOCKET NO: 51094

PART _____

COMPLAINT FOR DECLARATORY JUDGMENT

(Filed September 26, 1976)

Comes Selma Cash Paty and for her cause of action says:

I.

The allegations of residence in the caption are true.

II.

Tom Moore, Jr. is Registrar at Large of Hamilton County Election Commission.

III.

Charles W. Hinson, James W. Penley, Albert W. Secor, Mrs. Tommie Carter, and Claude Clark, Jr. are all the members of the Hamilton County Election Commission, of which Charles W. Hinson, is Chairman.

IV.

Plaintiff is a duly qualified candidate for a delegate for the Constitutional Convention.

V.

Rev. Paul A. McDaniel is not qualified to serve in the Constitutional Convention by the Constitution Disqualification contained in Article IX of the Tennessee Constitution which

[2]

states:

> "Section 1. Ineligibility of ministers and priests to seats in legislature. —Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no Ministers of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature".

The call for the Convention Public Act 848, Section 4, sets the qualifications for delegates to the convention, as follows:

> "Section 4. *Any citizen of the State who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for delegate to the convention* upon filing with the County Election Commission of his county a nominating petition containing not less than twenty-five (25) names of legally qualified voters of his or her representative district. Each district must be represented by a qualified voter of that district. In the case of a candidate from a representative district comprising more than one county, only one qualifying petition need be filed by the candidate, and that in his home county, with a certified copy thereof filed with the Election Commission of the other counties of his representative district".

VI.

The Rev. Paul A. McDaniel is a Minister of God, serving as pastor of a Baptist Church at this time.

VII.

In the event Rev. Paul A. McDaniel is elected to serve, he could not constitutionally be seated, and the 29th District would be without an elected delegate.

VIII.

It would be unjust to the people of the 29th District to allow the Rev. Paul A. McDaniel's name to remain on the ballot and to lead the people of that district to

believe he could serve if elected. The matter should be decided by the Court prior to the election.

IX.

The Election Commission has certified his petition and will not remove his name from the ballot unless ordered to do so by this Court. The ballots will be ordered printed on or about October 4, 1976.

[3]

PREMISES CONSIDERED: PLAINTIFF PRAYS THAT:

1. This complaint be filed and process issue and be served on all defendants.

2. A temporary restraining order issue restraining the Election Commission from printing the ballots until the issue of Rev. Paul A. McDaniel's eligibility is determined by this Court.

3. A show cause issue requiring the defendants to appear and show cause why the Rev. Paul A. McDaniel's name should not be ruled ineligible to serve as a delegate to the Constitutional Convention and why his name should not be stricken from the ballot.

4. At the hearing, the Court decide whether or not Rev. Paul A. McDaniel is disqualified from serving as a delegate to the Constitutional Convention.

5. In the event the Court rules that he is disqualified from serving as a delegate that an injunction issue restraining the Election Commission from placing his name on the ballot.

6. General relief.

THIS IS THE FIRST APPLICATION FOR EXTRAORDINARY PROCESS IN THIS CAUSE.

/s/ Selma C. Paty
SELMA C. Paty

STATE OF TENNESSEE:

COUNTY OF HAMILTON:

Personally appeared before me Selma C. Paty, who after first being duly sworn, makes oath that she has read the foregoing complaint, knows the contents thereof, and that the same is true and correct to the best of knowledge, information and belief.

This 28 day of September, 1976.

/s/ BARBARA LAWSON
NOTARY PUBLIC

MY COMMISSION EXPIRES: 1-7-80

APPENDIX F

IN THE CHANCERY COURT OF
HAMILTON COUNTY, TENNESSEE
PART II

SELMA CASH PATY	*	
	*	
V.	*	NO. 51094
	*	
REV. PAUL A. McDANIEL	*	
Et Al.	*	

ANSWER OF DEFENDANT, REV. PAUL A. McDANIEL

(Filed October 4, 1976)

Comes defendant, Reverend Paul A. McDaniel, and for answer to the Complaint filed in this cause says:

I

Defendant admits the allegations contained in Paragraphs I, II, and III of the Complaint.

II

This defendant is uninformed as to whether plaintiff is a duly qualified candidate for a delegate to the Constitutional Convention, as alleged in Paragraph IV of the Complaint, but admits that she has been certified by the Hamilton County Election Commission as a qualified candidate for election as a delegate to the Constitutional Convention.

III

Defendant denies that he is not qualified to serve as a delegate to the Constitutional Convention, but admits the other allegations contained in Paragraph V of the Complaint.

IV

The allegations contained in Paragraph VI of the Complaint are admitted.

V

The allegations contained in Paragraphs VII and VIII of the Complaint are denied.

VI

The allegations contained in Paragraph IX of the Complaint are admitted.

[2]

VII

This defendant alleges that he is a duly qualified candidate for election to the Constitutional Convention, referred to in the Complaint, and that he is not disqualified as alleged in the Complaint. This defendant alleges that the constitutional and legislative provisions relied upon by the plaintiff in her Complaint violate the Constitution of the United States, Amendment 1 and Amendment 14, Section 1, and are repugnant and contradictory to the provisions of Article 1, Section 4, and Article 9, Section 2, of the Constitution of the State of Tennessee (and hence violate the provisions of the aforementioned Amendments 1 and 14 of the Constitution of the United States).

Appendix F

VIII

This defendant alleges that the Court is without jurisdiction to hear and determine the questions involved in this cause.

Having answered the Complaint, the defendant prays that he be dismissed with his costs.

/s/ J. THOMAS MANN
J. Thomas Mann, Attorney for
Defendant, Rev. Paul A.
McDaniel
330 Pioneer Building
Chattanooga, Tennessee 37402
Telephone: 265-0214

[Certificate of Service Omitted]

APPENDIX G

IN THE CHANCERY COURT OF
HAMILTON COUNTY, TENNESSEE
PART 2

SELMA CASH PATY	•	
	•	
vs.	•	NO 51094
	•	
REV. PAUL A. McDANIEL, ET AL.	•	

COUNTER-COMPLAINT, CROSS-COMPLAINT AND THIRD-PARTY COMPLAINT OF DEFENDANT REV. PAUL A. McDANIEL FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

(Filed October 21, 1976)

Defendant, Rev. Paul A. McDaniel, previously having filed his Answer in this cause, now, with leave of Court pursuant to Rules 13 and 14 of the Tennessee Rules of Civil Procedure, assumes the role of Counter-Plaintiff, Cross-Plaintiff and Third-Party Plaintiff (hereinafter referred to as "Counter-Plaintiff"), and filed this his Counter-Complaint, Cross-Complaint and Third-Party Complaint (hereinafter referred to as "Counter-Complaint"), against the following persons: RAY BLANTON, Governor of the State of Tennessee; BROOKS MCLEMORE, Attorney General of the State of Tennessee; JOE C. CARR, Secretary of the State of Tennessee; SHIRLEY HASSLER, Coordinator of Elections for the State of Tennessee;

LYTEL LANDERS, Chairman of the State Election Commission of Tennessee; JAMES E. HARPSTER, TOMMY POWELL, RICHARD HOLCOMB, and JACK C. SEATON, members of the State Election Commission of Tennessee; CHARLES HINSON, Chairman of the Hamilton County Election Commission, Hamilton County, Tennessee; CLAUDE CLARK, MRS. TOMMIE CARTER, JAMES W. PENLEY AND ALBERT W. SECOR, members of the Hamilton County Election Commission, Hamilton County, Tennessee; TOM MOORE, JR., Registrar-at-Large for the Hamilton County Election Commission, Hamilton County, Tennessee; and SELMA CASH PATY, original plaintiff in the above-styled cause.

For cause of action, counter-plaintiff, Rev. Paul A. McDaniel, says:

I

Counter-defendant, Ray Blanton, is Governor of the

[2]

State of Tennessee. As such, under the provisions of Article 3, Section 10, of the Constitution of the State of Tennessee, he is charged with the responsibility of faithfully carrying out and executing the laws of the State of Tennessee and of the United States. He resides in Davidson County, Tennessee.

Counter-defendant, Brooks McLemore, is Attorney General of the State of Tennessee. As such he is its executive head of the legal department of the state, and, pursuant to the provisions of *Tennessee Code Annotated*, Sections 8-603 and 8-609, is charged with the responsibility of furnishing legal advice to the departments of the state and of defending litigated matters in which the state or

any of its officers or departments is interested. Under *Tennessee Code Annotated*, Section 23-1107, the Attorney General is a necessary party in any declaratory judgment proceeding challenging the constitutionality of any state statute. He resides in Davidson County, Tennessee.

Counter-defendant, Joe C. Carr, is Secretary of the State of Tennessee. Under the provisions of *Tennessee Code Annotated*, Section 2-111, it is his duty to appoint a Coordinator of Elections of the State of Tennessee to serve at the pleasure of the Secretary of State. He resides in Davidson County, Tennessee.

Counter-defendant, Shirley Hassler, is Coordinator of Elections of the State of Tennessee. Under *Tennessee Code Annotated*, Sections 2-1111 and 2-1112, it is his duty to obtain and maintain uniformity in the operation and interpretation of election laws of the state, to supervise all elections in the state, to advise election commissions and registrars-at-large, and to interpret the election laws for all persons administering them. He resides in Davidson County, Tennessee.

Counter-defendant, Lytel Landers, is chairman, and counter-defendants, James E. Harpster, Tommy Powell, Richard Holcomb and Jack C. Seaton, are members of the State Election Commission of Tennessee. Under the provisions of *Tennessee*

[3]

Code Annotated, Section 2-1201, it is the duty of the election commission to appoint election commissioners for each county in the state. The principal office of the State Election Commission is in Davidson County, Tennessee.

Counter-defendant, Charles Hinson, is chairman, and counter-defendants, Claude Clark, Mrs. Tommie Carter, James W. Penley, and Albert W. Secor, are members of the Hamilton County Election Commission. Under the provisions of *Tennessee Code Annotated*, Section 2-1209, it is their duty to employ a Registrar-at-Large for Hamilton County to assist them in performing their duties under the election laws of the state. They reside in Hamilton County, Tennessee, and are original defendants in the above-styled cause.

Counter-defendant, Tom Moore, Jr., is Registrar-at-Large for the Hamilton County Election Commission. He resides in Hamilton County, Tennessee, and is an original defendant in the above-styled cause.

Counter-defendant, Selma Cash Paty, is a candidate opposing counter-plaintiff for election as a delegate from the 29th legislative district in Hamilton County to the Tennessee Constitutional Convention referred to in the original complaint and answer filed in the above-styled cause. She is a resident of Hamilton County, Tennessee, and is the original plaintiff in the above-styled cause.

II

This cause arises under *Tennessee Code Annotated*, Title 23, Chapter 11, and 42 U.S.C. §1983.

III

Counter-plaintiff, Rev. Paul A. McDaniel, brings this action individually and as a class action on behalf of himself and others similarly situated as independent voters in the State of Tennessee, present and future, who wish to vote for candidates for election as delegates to the 1977 Constitutional Convention in the State of Tennessee,

in the

[4]

General Election to be held in the state on November 2, 1976, or subsequent elections for delegates to subsequent Constitutional Conventions to be convened in the State of Tennessee; as a class action on behalf of himself and others similarly situated as independent voters in the State of Tennessee, present and future, who wish to vote for candidates for election as members of the House of Representatives and Senate in the State of Tennessee, in the General Election to be held on November 2, 1976, and subsequent elections in the State of Tennessee for such offices; as a class action on behalf of himself and other putative candidates who are or may be a "Minister of the Gospel" or "priest of any denomination whatever", present and future, and who wish to seek election as a delegate to the 1977 Constitutional Convention in the State of Tennessee, in the General Election to be held in the state on November 2, 1976, or subsequent constitutional conventions to be convened in the State of Tennessee; as a class action on behalf of himself and others similarly situated as independent voters in the State of Tennessee, present and future, who wish to vote for a candidate (who is a "Minister of the Gospel" or "priest of any denomination whatever") for election as a delegate to the 1977 Constitutional Convention in the State of Tennessee, in the General Election to be held in the state on November 2, 1976, or subsequent elections for delegates to subsequent constitutional conventions to be convened in the State of Tennessee; and as a class action on behalf of himself and others similarly situated as independent voters in the State of Tennessee, present and future, who

wish to vote for a candidate (who is a "Minister of the Gospel" or "priest of any denomination whatever") for election as a member of the House of Representatives or Senate in the State of Tennessee, in the General Election to be held on November 2, 1976, and subsequent elections in the State of Tennessee for such offices.

[5]

This class action is brought pursuant to Rule 23, Tennessee Rules of Civil Procedure, generally, and specifically pursuant to Rule 23.01 and Rule 23.02(2), Tennessee Rules of Civil Procedure.

IV

Counter-plaintiff repeats the admissions and averments contained in his Answer to the original Complaint filed in this cause, as if fully set forth herein.

V

Counter-plaintiff avers that he and counter-defendant, Selma Cash Paty, are opposing candidates in the 29th legislative district of Hamilton County for election as a delegate to the Tennessee Constitutional Convention called pursuant to the provisions of Tennessee Public Acts, 1976, Chapter 848. Under Section 3 of said Act, delegates shall be elected at the General Election to be held in the state on November 2, 1976.

VI

Under Section 4 of said Public Act, "[a]ny citizen of the state who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for delegate to the convention. . . ." The Hamilton County Election Commission has certified both

counter-plaintiff and counter-defendant, Selma Cash Paty, as qualified candidates for election as a delegate to the convention from the 29th legislative district in Hamilton County.

VII

By the filing of the original Complaint in this cause, by counter-defendant, Selma Cash Paty, claiming that counter-plaintiff is ineligible to be a candidate for election as a delegate to the convention, because of the provisions of Article 9, Section 1, of the Constitution of the State of Tennessee, a substantial cloud has been placed upon counter-plaintiff's candidacy. The inevitable resulting confusion in the minds of voters in the 29th district constitutes a threat of injury

[6]

to counter-plaintiff's candidacy that is real and immediate.

VIII

Counter-defendant avers that he is a citizen of the United States and of the State of Tennessee and that he is a qualified voter registered in Hamilton County, Tennessee. He intends to vote in the coming election and in future elections held in the State of Tennessee. He would like to vote for a "Minister of the Gospel" or "priest of any denomination whatever" in the coming election for delegates to the Constitutional Convention and in future elections for delegates to constitutional conventions. He would like to vote for a "Minister of the Gospel" or "priest of any denomination whatever" in the coming election and in future elections for membership in the Tennessee House of Representatives and Senate. More-

over, he may be a candidate for election as a delegate in future elections for delegates to a subsequent constitutional convention as well as a candidate for election as a member of the Tennessee House of Representatives or Senate in future elections.

IX

Counter-plaintiff avers that he is a Black "minister of the Gospel". The political leadership among Black people in his community and other communities in Tennessee disproportionately consists of persons who are "ministers of the Gospel" as compared to the political leadership in white communities in Tennessee. As a result, exclusion of ministers by effect, albeit not by original intent, dilutes on racial grounds the right of counter-plaintiff and other voters and putative candidates, similarly situated, to vote and to be candidates, in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

X

Counter-plaintiff alleges that the qualification

[7]

provisions of Section 4, Chapter 848, Tennessee Public Acts, 1976, and Article 9, Section 1, of the Tennessee Constitution are unconstitutional under the First and Fourteenth Amendments of the United States Constitution, in that they purport to deprive him of his right to candidacy and of his free exercise of voting and political association privileges guaranteed to him as a citizen of the United States and of the State of Tennessee. In addition, said statutory and constitutional provisions deprive counter-

plaintiff of the free exercise of religion and amount to an establishment of religion, both in violation of the First Amendment and the due process clause of the Fourteenth Amendment of the United States Constitution.

XI

Because of the immediate threat of injury to counter-plaintiff and the irreparable damage that may be suffered by him in the forthcoming election, counter-plaintiff requests that forthwith, in the exercise of inherent equity powers and powers conferred under *Tennessee Code Annotated*, Title 23, Chapter 11, the Court declare that the candidate qualification provisions of Section 4, Chapter 848, Tennessee Public Acts, 1976, and Article 9, Section 1, of the Constitution of the State of Tennessee, are unconstitutional under the First and Fourteenth Amendments of the United States Constitution; the Court declare counter-plaintiff eligible as a candidate for election as a delegate to the 1977 Tennessee Constitutional Convention; and the Court issue an injunction restraining each of the defendants from excluding counter-plaintiff as a candidate in said election and from interfering in any manner with his candidacy in said election. Counter-plaintiff further requests the Court to issue an injunction restraining each of the defendants, as may be applicable, from excluding or disqualifying "Ministers of the Gospel" or "priests of any denomination whatever" as candidates for election as delegates to the 1977 Tennessee Constitutional Convention or any subsequent state constitutional convention

[8]

or as candidates for membership in the Tennessee House of Representatives and Senate in the coming election and in subsequent elections for such offices.

PREMISES CONSIDERED, COUNTER-PLAINTIFF PRAYS:

1. That a summons be issued and, together with a copy of this counter-complaint, be served upon all counter-defendants who are not now before the court as parties, and that all defendants be required to answer this counter-complaint but not under oath.

2. That, after a hearing, the Court enter a judgment declaring:

a. That counter-plaintiff is an eligible candidate for election as a delegate from the 29th legislative district to the 1977 Tennessee Constitutional Convention.

. b. That the delegate qualification provisions of Section 4, Chapter 848, Tennessee Public Acts, 1976, and Article 9, Section 1, of the Tennessee Constitution are unconstitutional under the First and Fourteenth Amendments of the United States Constitution.

3. That, after a hearing, the Court issue an injunction:

a. Restraining each of the defendants from excluding counter-plaintiff as a candidate for election as a delegate to the 1977 Tennessee Constitutional Convention and from interfering in any manner with his candidacy in said election.

b. Restraining each of the defendants, as may be applicable, from excluding or disqualifying "Ministers of the Gospel" or "priest of any denomination whatever" as candidates for election as delegates to the 1977 Tennessee Constitutional Convention or any subsequent state constitutional conventions, or as candidates for election

as members of the Tennessee House of Representatives and Senate in the General

[9]

Election to be held on November 2, 1976, and in subsequent elections for such offices.

4. That because of the limitations of time this matter be expedited for hearing and decision by the Court.

5. That counter-plaintiff have such further relief to which he may be entitled.

This is the second application for extraordinary relief in this cause.

FREDERIC S. LECLERCQ, and
THOMAS, LEITNER, MANN,
WARNER & OWENS

By: /s/ J. THOMAS MANN
Attorneys for Counter-Plaintiff, Rev. Paul A. McDaniel
330 Pioneer Building
Chattanooga, Tennessee 37402
Telephone: 265-0214

[Certificate of Service Omitted]

APPENDIX H

IN THE CHANCERY COURT OF
HAMILTON COUNTY, TENNESSEE
PART 2

SELMA CASH PATY *
*
vs. * NO. 51094
*
REV. PAUL A. McDANIEL, ET AL. *

ORDER

In this cause, the "Counter-Complaint, Cross-Complaint and Third Party Complaint of Defendant, Rev. Paul A. McDaniel, for Declaratory Judgment and Injunctive Relief" having been filed as a class action pursuant to Rule 23 of the Tennessee Rules of Civil Procedure, and the Court having considered said pleading together with the entire record in this cause, the Court is of the opinion and determines and finds that, as required by Rule 23.01, (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class; and further, as required by Rule 23.02(2), the Court is of the opinion and determines and finds that the parties opposing the class have acted or refused to act on grounds generally applicable to the class, thereby

making appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole.

Accordingly, it is ORDERED AND ADJUDGED that the "Counter-Complaint, Cross-Complaint and Third-Party Complaint of defendant, Rev. Paul A. McDaniel, for Declaratory Judgment and Injunctive Relief" shall be maintained as a class action pursuant to Rule 23.01 and Rule 23.02(2), Tennessee Rules of Civil Procedure.

Enter this 22nd day of October, 1976.

/s/ HERSCHEL P. FRANKS
CHANCELLOR, PART 2

ENROLLED October 22, 1976,
BOOK U-2 PAGE 277

[2]

APPROVED FOR ENTRY:

/s/SELMA CASH PATY
Selma Cash Paty, Pro Se
Plaintiff
17-19 Patten Parkway
Chattanooga, Tennessee 37402

FREDERIC S. LECLERCQ and
THOMAS, LEITNER, MANN, WARNER & OWENS

By: /s/ J. THOMAS MANN
Attorneys for Defendant,
Rev. Paul A. McDaniel
330 Pioneer Building

THEREUPON, COURT ADJOURNED UNTIL MONDAY

MORNING, OCTOBER 25, 1976, AT 9:00 O'CLOCK, A.M.

/s/ HERSCHEL P. FRANKS,
CHANCELLOR - PART II

APPENDIX I

CHANCERY COURT,
HAMILTON COUNTY, TENNESSEE, PART II

SELMA CASH PATY	•	
	•	
versus	•	Docket No. 51094
	•	
REV. PAUL A. McDANIEL, et al	•	

ANSWER OF SELMA CASH PATY

(Filed October 22, 1976)

Comes Selma Cash Paty for answer to that part of the counter-complaint that is material to the cause of action and says:

This defendant admits there is a cloud on counter-plaintiff's candidacy but denies that the filing of her complaint placed the cloud on his candidacy.

The Constitution of the State of Tennessee, Article 9 Section 1, clearly states ministers are not qualified to serve in the House of Representatives. Chapter 848 Section 4 by reference disqualifies ministers from serving as delegates to the Constitutional Convention.

Rev. Paul A. McDaniel knew the above statute and section of the Constitution diqualified him. When he chose to run without first judicially having determined the constitutionality of said law, he elected to run with a cloud on his candidacy. That cloud was placed there by the Constitution of the State of Tennessee in 1796.

The Court must presume the Constitutional Convention would follow the law as it exists when it convenes. Relying on the law in the State of Tennessee as it was when her action was filed, the convention could not seat a minister.

She filed the original declaratory action, because she felt the voters did have the right to know counter-defendant could not be seated, if elected, unless the Court declared the statute and Constitution provision setting the qualifications

for delegates unconstitutional.

This counter-defendant has always maintained that this issue should be judicially decided before the election so the cloud would be lifted and the voters could cast their ballot in the sunshine.

Counter-plaintiff's allegation that he is a "Black" minister is totally immaterial to this issue and is an unwarranted attempt to inject racism into the issue. The questioned statute and Constitution provisions applies to all ministers, of every race, color or creed.

There is no proof in the record or in fact that "Black" ministers are any more or less politically active then "White" ministers.

Counter-defendant denies the prohibition denies counter-plaintiff of his free exercise of voting and political association privileges. She denies he has an absolute right to be a candidate for the House of Representatives or the Contitutional Convention. The state has an overriding interest in separating church and state which it has elected to exercise by restricting the service of ministers in the lawmaking processes of its government.

Said provisions do not deprive counter-plaintiff of his right of free exercise of religion. There is no restrictions on his religion, only on his profession.

Ministers, classified as an occupation, were granted exemption from the draft.

Ministers, classified as an occupation, are granted exemption from jury duty.

Ministers, classified as an occupation, do not pay taxes on the value of the use of a parsonage or manse, although all other employed persons must pay such taxes.

Constitutionally it is not permissible to favor one religion over another, or religion to non-religion. Therefore,

if counter-plaintiff's contentions were correct those laws which grant special privileges to ministers would be unconstitutional.

All other allegations not expressly admitted or denied are denied.

S. C. PATY
(MRS.) SELMA C. PATY
APPELLANT
AND
COUNTER-DEFENDANT

[Certificate of Service Omitted]

APPENDIX J

IN THE
CHANCERY COURT,
HAMILTON COUNTY, TENNESSEE, PART 2

SELMA CASH PATY	•	
	•	
versus	•	NO. 51094
	•	
REV. PAUL A. MCDANIEL, ET AL.	•	

FINAL JUDGMENT

(Filed October 25, 1976)

This cause came on to be further heard on the 22nd day of October, 1976, before the Honorable Hershcel P. Franks, Chancellor of the Chancery Court for Hamilton County, Tennessee, Part 2, upon the Order of Remand and Procedendo issued by the Supreme Court of Tennessee; the original Complaint filed by plaintiff, Selma Cash

Paty; the Motion to Dismiss and Answer filed by defendant, Rev. Paul A. McDaniel; oral testimony previously heard in open court; the Waiver and Acknowledgment of E. Brooks McLemore, Attorney General of the State of Tennessee; dated October 18, 1976; the Counter-Complaint, Cross-Complaint, and Third-Party Complaint of Defendant, Rev. Paul A. McDaniel, for Declaratory Judgment and Injunctive Relief; the Order of the Court allowing the said Counter-Complaint, Cross-Complaint and Third-Party Complaint to be maintained as a Class Action pursuant to Rule 23.01 and Rule 23.02(2), Tennessee Rules of Procedure; the Acknowledgment of Service and Waiver of counter-defendant, Tom Moore, Jr., Registrar-at-Large, dated October 21, 1976, on behalf of himself and the counter-defendants who are members of the Hamilton County Election Commission; the Acknowledgment and Waiver of counter-defendant, E. Brooks McLemore, Attorney General of the State of Tennessee, dated October 21, 1976, on behalf of himself and counter-defendants Ray Blanton, Governor of the State of Tennessee, Joe C. Carr, Secretary of the State of Tennessee, Shirley Hassler, Coordinator of Elections of the State of Tennessee, Lytel Landers, Chairman of the State Election Commission, and James E. Harpster, Tommy Powell, Richard Holcomb and Jack C. Seaton, members of the State Election Commission; the Answer of counter-defendant,

[2]

Selma Cash Paty; the Stipulation filed on behalf of counter-plaintiff, Rev. Paul A. McDaniel, and counter-defendant, Selma Cash Paty; and upon the entire record in this cause.

Upon consideration of all of the foregoing, the Court rendered a Memorandum Opinion which is incorporated herein and made a part hereof as follows:

(Clerk here copy Memorandum Opinion in full)

It is, therefore, ORDERED and ADJUDGED as follows:

1. That the Motion to Dismiss filed by defendant, Rev. Paul A. McDaniel, be and it hereby is overruled.

2. That the portion of Section 4 of Chapter 848 of the Public Acts of Tennessee, 1976, which reads, ". . . who can qualify for membership in the House of Representatives of the General Assembly . . .", be and it hereby is declared to be in violation of the requirements of the First Amendment of the federal Constitution.

3. That the requirements for the office of delegate to the 1977 Tennessee Constitutional Convention be and they hereby are declared to be determined by the general statutes on qualifications for office-holders, as set forth in the Code of Tennessee.

4. That defendant and counter-plaintiff, Rev. Paul A. McDaniel, and all other persons, similarly situated, composing the class of "ministers of the Gospel" and "priests of any denomination whatever", be and hereby are declared to be eligible to be a candidate and to serve as a delegate to the 1977 Tennessee Constitutional Convention called for by Chapter 848 of the Public Acts of Tennessee, 1976.

5. That the Restraining Order in this cause, enrolled in the minutes of the Court on September 28, 1976, be and it hereby is dissolved.

6. That all other relief sought by the parties and raised in the pleadings, including the prayer of counter-plaintiff, Rev. Paul A. McDaniel, for injunctive relief, be and hereby is denied.

7. That the costs of this cause be adjudged equally against the parties, Selma Cash Paty and Rev. Paul A. McDaniel.

To all of the foregoing action of the Court, plaintiff and counter-defendant, Selma Cash Paty, excepts and prays an immediate appeal to the Supreme Court of Tennessee at Knoxville, which is hereby granted, and to which defendant, Rev. Paul A. McDaniel, does not object.

Enter this 25th day of October, 1976.

/s/ HERSCHEL P. FRANKS
CHANCELLOR, PART 2

APPROVED FOR ENTRY:

/s/ SELMA CASH PATY
Selma Cash Paty, Pro Se
Plaintiff and Counter-Defendant
17-19 Patten Parkway
Chattanooga, Tennessee 37402

FREDERIC S. LECLERCQ and
THOMAS, LEITNER, MANN, WARNER & OWENS

By: /s/ J. THOMAS MANN
Attorneys for Defendant
and Counter-Plaintiff
Rev. Paul A. McDaniel
330 Pioneer Building
Chattanooga, Tennessee 37402

Supreme Court, U. S.
FILED
AUG 4 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. A-12 (76-1427)

REV. PAUL A. McDANIEL,
Appellant,

v.

SELMA CASH PATY, a Resident of Hamilton County, Tennessee; SHIRLEY HASSLER, as Coordinator of Elections of the State of Tennessee; LYTEL LANDERS, as Chairman of the State Election Commission of Tennessee; RAY BLANTON, as Governor of the State of Tennessee; BROOKS McLEMORE, as Attorney General of the State of Tennessee; JOE C. CARR, as Secretary of State of Tennessee; JAMES HARPSTER, TOMMY POWELL, RICHARD HOLCOMB, JACK SEATON, as Members of the State Election Commission of Tennessee; CHARLES HINSON, Chairman of the Hamilton County Election Commission; CLAUDE CLARK, TOMMIE CARTER, JAMES PENLEY, ALBERT W. SECOR, as Members of the Hamilton County Election Commission; TOM MOORE, JR., as Registrar-at-Large for the Hamilton County Election Commission,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE

FILED: APRIL 15, 1977

PROBABLE JURISDICTION NOTED: JUNE 20, 1977

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. A-12 (76-1427)

REV. PAUL A. McDANIEL,
Appellant,

v.

SELMA CASH PATY, a Resident of Hamilton County, Tennessee; SHIRLEY HASSLER, as Coordinator of Elections of the State of Tennessee; LYTEL LANDERS, as Chairman of the State Election Commission of Tennessee; RAY BLANTON, as Governor of the State of Tennessee; BROOKS McLEMORE, as Attorney General of the State of Tennessee; JOE C. CARR, as Secretary of State of Tennessee; JAMES HARPSTER, TOMMY POWELL, RICHARD HOLCOMB, JACK SEATON, as Members of the State Election Commission of Tennessee; CHARLES HINSON, Chairman of the Hamilton County Election Commission; CLAUDE CLARK, TOMMIE CARTER, JAMES PENLEY, ALBERT W. SECOR, as Members of the Hamilton County Election Commission; TOM MOORE, JR., as Registrar-at-Large for the Hamilton County Election Commission,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE

APPENDIX

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IN THE SUPREME COURT OF TENNESSSEE
AT KNOXVILLE

Rev. Paul A. McDaniel,

Appellant,

v.

Selma Cash Paty, a Resident of Hamilton County, Tennessee; Shirley Hassler, as Coordinator of Elections of the State of Tennessee; Lytel Landers, as Chairman of the State Election Commission of Tennessee; Ray Blanton, as Governor of the State of Tennessee; Brooks McLemore, as Attorney General of the State of Tennessee; Joe C. Carr, as Secretary of State of Tennessee; James Harpster, Tommy Powell, Richard Holcomb, Jack Seaton, as Members of the State Election Commission of Tennessee; Charles Hinson, Chairman of the Hamilton County Election Commission; Claude Clark, Tommie Carter, James Penley, Albert W. Secor, as Members of the Hamilton County Election Commission; Tom Moore, Jr., as Registrar-at-Large for the Hamilton County Election Commission,

Appellees.

No. A-12 (76-1427)

Date	Entry
1976	
*Sept. 28	Original complaint for declaratory judgment

* Asterick indicates that entry was reproduced in Appellant's Jurisdictional Statement, except for entries reproduced herein.

Sept. 28 Summons for defendant to appear

Sept. 28 Order to show cause

Sept. 28 Temporary restraining order

*Oct. 4 Answer of defendant

Oct. 4 Motion to dismiss by defendant

Oct. 4 Proceedings of trial

*Oct. 5 Memorandum opinion by chancellor

Oct. 6 Final judgment enrolled by Chancery Court of Hamilton County

Oct. 6 Appeal bond filed

Oct. 6 Bill of exception filed

Oct. 6 Stipulation that all time limits waived for expedited hearing

Oct. 15 Tennessee Supreme Court enters an Order of Remand on the ground that the Attorney General of Tennessee was not made a party or served with a copy of the proceedings pursuant to Tenn. Code Ann. § 23-1107 and Tenn R. Civ. P. 24.04

Oct. 19 Waiver and acknowledgment filed by Attorney General of Tennessee

Oct. 21 Motion to file counter-complaint filed by defendant/counter-plaintiff for class action pursuant to Tenn. R. Civ. P. 23.01 and 23.02(2) for declaratory and injunctive relief

Oct. 21 Order by chancellor to serve Attorney General of Tennessee pursuant to Tenn. R. Civ. P. 24.04 and Tenn. Code Ann. § 23-1107, and "counter complaint, cross complaint and third-party complaint" of defendant filed

*Oct. 21 Counter complaint, cross complaint and third-party complaint of defendant/counter plaintiff

Oct. 21 Summons for defendants of "counter complaint, cross-complaint and third-party complaint" to answer

Oct. 21 Acknowledgment of service and waiver

*Oct. 22 Answer from plaintiff/counter-defendant

Oct. 22 Acknowledgment and waiver by Attorney General of Tennessee

Oct. 22 Stipulation that no more evidence be introduced

*Oct. 22 Memorandum opinion of chancellor

*Oct. 22 Order that counter complaint be maintained as a class action

*Oct. 25 Final judgment of Chancery Court of Hamilton County, Tennessee

Oct. 25 Order granting appeal

Oct. 25 Appeal bond filed by plaintiff and defendant

1977

*Mar. 7 Decree of Tennessee Supreme Court filed

*Mar. 7 Opinion of Tennessee Supreme Court filed

*Apr. 15 Notice of Appeal to the United States Supreme Court filed

*Mar. 16 Stay order of Tennessee Supreme Court staying decree of March 16, 1977 for ninety days from and after March 16, 1977

*June 28 Order of Tennessee Supreme Court of June 28, 1977 denying application for stay filed June 21, 1977

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

(Title omitted in printing)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable John A. Parker, Clerk of the Supreme Court of Tennessee:

Please take notice that the Rev. Paul McDaniel, appellee in the above styled civil action, hereby appeals the judgment of the Tennessee Supreme Court of March 7, 1977 under 28 U.S.C. § 1257 (2).

The Clerk of the Tennessee Supreme Court is requested pursuant to the Rules of the Supreme Court of the United States, R. 12, to certify and transmit to the Clerk of the Supreme Court of the United States a full and complete copy of the record in the above styled civil action.

Respectfully submitted,

FREDERIC S. LE CLERCQ
1505 West Cumberland
Knoxville, Tennessee 37916
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J. THOMAS MANN
THOMAS, LEITNER, MANN,
WARNER & OWENS
330 Pioneer Building
Chattanooga, Tennessee 37402
Telephone: (615) 265-0214
By: FREDERIC S. LE CLERCQ

(Certificate of service on opposing counsel executed March 17, 1977.)

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

(Title omitted in printing)

STAY ORDER

Upon application of Reverend Paul McDaniel, the decree of this Court entered on March 16, 1977, in conformity with the Court's Opinion of March 7, 1977, is hereby stayed for a period of ninety (90) days from and after March 16, 1977, or until the Supreme Court of the United States acts upon his appeal or petition for certiorari, whichever occurs first.

The Clerk is directed to send a copy of this Stay Order to the legislative body of Hamilton County.

/s/ WM. H. D. FONES
Justice

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

(Title omitted in printing)

ORDER

It appearing that the United States Supreme Court has noted probable jurisdiction,

The application for stay filed June 21, 1977, is respectfully denied.

For the Court:

/s/ WM. H. D. FONES
Justice

NOTATION

The following items appear in the appendix to the jurisdictional statement at the pages noted and are not reprinted in this appendix:

(1) Original complaint for declaratory judgment A.43

(2) Answer of defendant A.48

(3) Memorandum opinion by Chancellor (10-5-76) A.33

(4) Counter complaint, cross complaint and third-party complaint of defendant A.51

(5) Answer of plaintiff A.65

(6) Memorandum opinion by Chancellor (10-22-76) ...A.37

(7) Order that counter complaint be maintained as a class action A.62

(8) Final Judgment of Chancery Court of Hamilton County, Tennessee A.68

(9) Decree of Tennessee Supreme Court A.1

(10) Opinion of the Tennessee Supreme Court A.3

Supreme Court, U. S.
FILED
JUN 14 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1427

REV. PAUL A. McDANIEL,
Appellant,

vs.

SELMA CASH PATY, a Resident of Hamilton County, Tennessee; SHIRLEY HASSLER, as Coordinator of Elections of the State of Tennessee; LYTEL LANDERS, as Chairman of State Election Commission of Tennessee; RAY BLANTON, Governor, State of Tennessee; BROOKS McLEMORE, as Attorney General of the State of Tennessee; JOE C. CARR, as Secretary of State of Tennessee; JAMES HARPSTER, TOMMY POWELL, RICHARD HOLCOMB, JACK SEATON, as Members of State Election Commission of Tennessee; CHARLES HINSON, Chairman of the Hamilton County Election Commission; CLAUDE CLARK, TOMMIE CARTER, JAMES PENLEY, ALBERT W. SECOR, as Members of the Hamilton County Election Commission; TOM MOORE, JR., as Registrar-at-Large for the Hamilton County Election Commission,
Appellees.

On Appeal from the Supreme Court of Tennessee

MOTION OF THE ATTORNEY GENERAL FOR THE STATE OF TENNESSEE TO DISMISS, OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1427

REV. PAUL A. McDANIEL,
Appellant,

vs.

SELMA CASH PATY, a Resident of Hamilton County, Tennessee; SHIRLEY HASSLER, as Coordinator of Elections of the State of Tennessee; LYTEL LANDERS, as Chairman of State Election Commission of Tennessee; RAY BLANTON, Governor, State of Tennessee; BROOKS McLEMORE, as Attorney General of the State of Tennessee; JOE C. CARR, as Secretary of State of Tennessee; JAMES HARPSTER, TOMMY POWELL, RICHARD HOLCOMB, JACK SEATON, as Members of State Election Commission of Tennessee; CHARLES HINSON, Chairman of the Hamilton County Election Commission; CLAUDE CLARK, TOMMIE CARTER, JAMES PENLEY, ALBERT W. SECOR, as Members of the Hamilton County Election Commission; TOM MOORE, JR., as Registrar-at-Large for the Hamilton County Election Commission,
Appellees.

On Appeal from the Supreme Court of Tennessee

MOTION OF THE ATTORNEY GENERAL FOR THE STATE OF TENNESSEE TO DISMISS, OR AFFIRM

OPINION BELOW

The opinion of the Supreme Court of Tennessee was entered on March 7, 1977, and is reported in 547 S.W.2d 897.

JURISDICTION

The opinion of the Supreme Court of Tennessee, sitting at Knoxville, was entered on March 7, 1977. An order in accordance with the Supreme Court's opinion was entered on March 7, 1977, in the Clerk's Office at Knoxville. A notice of intent to appeal was filed with the Clerk on March 16, 1977. An application for a stay of execution was filed with the Clerk on March 28, 1977, and an Order granting a stay of execution for ninety (90) days pending an appeal to this Court was entered on April 21, 1977. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257(2) in that the Supreme Court of Tennessee has upheld the validity of a provision of the Constitution of Tennessee that is alleged to be repugnant to the Constitution of the United States.

QUESTIONS PRESENTED

The questions involved in this case are:

I

Is the Call for the Constitutional Convention, Chapter 848, Public Acts of 1976, Including § 4, and the Constitution of Tennessee, Article IX, § 1, Consistent With the Free Exercise of Religion Clause of the First and Fourteenth Amendments of the Constitution of the United States?

II

Is the Call for the Constitutional Convention, Chapter 848, Public Acts of 1976, Including § 4, and the Constitution of Tennessee, Article IX, § 1, Consistent With the Establishment Clause of the First and the Fourteenth Amendments of the Constitution of the United States?

III

Is the Call for the Constitutional Convention, Chapter 848, Public Acts of 1976, Including § 4, and the Constitution of Tennessee, Article IX, § 1, Consistent With the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States

The First Amendment to the Constitution of the United States provides for the free exercise of religion.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 for equal protection of the laws.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of Tennessee

Article II, § 9 of the Constitution of Tennessee provides for the qualifications of members of the Tennessee House of Representatives.

> "No person shall be a Representative unless he shall be a citizen of the United States, of the age of twenty-one years, and shall have been a citizen of this State for three years, and a resident in the county he represents one year, immediately preceding the election."

Article IX, § 1 of the Constitution of Tennessee provides for the disqualification of ministers from serving in the Tennessee General Assembly.

> "Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no Ministers of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature."

STATUTORY PROVISIONS INVOLVED

Chapter 848 of the Public Acts of 1976 of Tennessee, provides for a Limited Constitutional Convention to convene at Nashville on August 1, 1977. Section 4 of the Act provides for the selection and quailfications of the delegates to the Convention:

> "Any citizen of the state who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for delegate to the convention upon filing with the County Election Commission of his county a nominating petition containing not less than twenty-five (25) names of legally qualified voters of his or her representative district. Each district must be represented by a qualified voter of that district. In the case of a candidate from a representative district comprising more than one county, only one qualifying petition need be filed by the candidate, and that in his home county, with a certified copy thereof filed with the Election Commission of the other counties of his representative district.
>
> "Every person desiring to become a delegate to the convention shall qualify by the filing of qualifying petition or petitions by 12:00 o'clock noon, prevailing time, on

Wednesday, September 15, 1976. The names of candidates for the delegates to the convention shall be placed on the official ballot in the same manner as candidates for the General Assembly.

"The returns from the various counties of the state electing delegates to the convention shall be certified to the Secretary of State and canvassed by him and the Governor and the Attorney General in the same manner and form as the returns are required to be certified from the election in which the people vote for and against the calling of the convention, as provided in Section 1, and the Governor shall by proclamation announce the names of those elected as delegates to the convention. Delegates to the convention elected and certified shall receive a certificate of election signed by the Governor and attested by the Secretary of State under the Great Seal of the state."

STATEMENT OF THE CASE

This case is before the Court on appeal for a determination as to whether a minister or priest is qualified to hold a public office having the requirement that he be able to qualify as a member of the House of Representatives of the General Assembly, including the limitations contained in Article IX, Section 1 of the Constitution of Tennessee.

Pursuant to the provisions of Chapter 848, Public Acts of 1976, after the voters in Tennessee approved a call for a Constitutional Convention to be held in 1977, in the August 5, 1976 General Election, the appellant, the Rev. Paul McDaniel, the appellee, Selma Cash Paty, and two other persons filed qualifying petitions for the office of Delegate to the Convention, and their names appeared on the ballot to represent the 29th House

District, a part of Hamilton County, Tennessee.* Alleging that the Rev. McDaniel is a Minister of God, serving as pastor of a Baptist Church at the time and that if he should be elected to serve, he could not constitutionally be seated, and the 29th District would be without an elected delegate, the appellee Paty filed a complaint for a Declaratory Judgment, for a determination that the appellant McDaniel is disqualified from holding the office that he sought by reason of Article IX, Section 1 of the Constitution of Tennessee, in that he is a minister, and sought an injunction restraining the Hamilton County Election Commission from placing his name on the ballot. The appellant McDaniel, in his answer, alleged that he was a qualified candidate for election to the Constitutional Convention referred to in the Complaint, that he is not disqualified as alleged in the Complaint, and that the constitutional limitation in Article IX, Section 1, of the Constitution of Tennessee violates and is repugnant to the provisions of the First and Fourteenth Amendments of the Constitution of the United States and, therefore, cannot control.

After considering the limited testimony presented at a hearing and a Motion to Dismiss the complaint filed by the appellant McDaniel, the Court found that the appellant McDaniel is a minister of the gospel within the meaning of qualifications for delegates to the Convention, and that the qualificational requirements of Section 4, Chapter 848, Public Acts of 1976 are unconstitutional under the Constitution of the United States.

After the Chancellor granted an immediate appeal to the Supreme Court of Tennessee, the appellee Paty appealed to the Supreme Court sitting at Nashville. After a remand back to the Chancery Court because the Attorney General was not made a party to the suit, or given notice of the challenge to the consti-

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* The certified count of the votes for Delegate in the 29th House District shows that the Rev. McDaniel received more votes than the other three candidates.

tutional provisions of Article IX §1 of the Constitution of Tennessee, the Chancellor reaffirmed his prior determination that the part of Chapter 848, §4, Public Acts of 1976, requiring that delegates to the Convention be able to qualify for membership in the House of Representatives of the General Assembly, is unconstitutional under the Constitution of the United States.

After another appeal to the Supreme Court of Tennessee, the Supreme Court held, with one justice dissenting, that there was a compelling state interest involved that insures the separation of church and state, and hence Article IX, §1, of the Constitution of Tennessee is not violative of equal protection.

This case is now on appeal to this Honorable Court.

ARGUMENT

Pursuant to Rule 16. 1. (b) and (d) of this Court, the Attorney General of the State of Tennessee moves to dismiss the appeal on the ground that the questions on which the decision of this cause depends are so insubstantial as not to need further argument or, in the alternative, to affirm the decision of the Supreme Court of Tennessee, on the ground that the Tennessee Supreme Court has correctly determined that the call for the Constitutional Convention and Article IX, Section 1, of the Constitution of Tennessee are consistent with the Free Exercise of Religion Clause, the Establishment Clause, and the Equal Protection Clause of the First and Fourteenth Amendments of the Constitution of the United States.

I

The Questions on Which the Decision of This Cause Depends Are So Insubstantial as Not to Need Further Argument.

In *Two Guys From Harrison-Allentown v. McGinley*, 366 U.S. 582 (1961) this Court had under consideration the question of whether a Pennsylvania Sunday Closing Law had as its purpose or had the effect of being religious, and one respecting the establishment of religion, or one unnecessarily infringing upon the First Amendment. In holding that the Sunday Closing Law was not religious, and did not violate the due process and equal protection clauses of the Fourteenth Amendment, this Court said that

> "Having carefully examined the entirety of the present legislation, the relevant judicial characterizations and, particularly, the legislative history leading to the passage of the 1959 Act immediately before us, we hold that neither the statute's purpose nor its effect is religious. See *McGowan v.*

State of Maryland, supra, 366 U.S. at p. 449, 81 S.Ct. at p. 1117. Moreover, for the same reasons stated in *McGowan v. State of Maryland*, supra, 366 U.S. at pages 449-452, 81 S.Ct. at pages 1117-1119, we reject appellant's contention that the State has other means at its disposal to accomplish its secular purpose that would not even remotely or incidentally give state aid to religion." p. 598.

In *Braunfeld v. Brown*, 366 U.S. 599 (1961), decided by this Court on the same day as *Two Guys From Harrison-Allentown v. McGinley*, supra, involving the same Pennsylvanian Sunday Closing Law, this Court had under consideration the question of whether the Sunday Closing Law interfers with the free exercise of the appellant's religion. In discussing this issue this Court pointed out that

"Certain aspects of religious exercise cannot, in any way, be restricted or burdened by either federal or state legislation. Compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden. The freedom to hold religious beliefs and opinions is absolute. *Cantwell v. State of Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213; *Reynolds v. United States*, 98 U.S. 145, 166, 25 L.Ed. 244. Thus, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, this Court held that state action compelling school children to salute the flag, on pain of expulsion from public school, was contrary to the First and Fourteenth Amendments when applied to those students whose religious beliefs forbade saluting a flag. But this is not the case at bar; the statute before us does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets.

"However, the freedom to act, even where the action is in accord with one's religious convictions, is not totally free from legislative restrictions. *Cantwell v. State of Connecticut*, supra, 310 U.S. at pages 303-304, 306, 60 S.Ct. at pages 903-904. As pointed out in *Reynolds v. United States*, supra, 98 U.S. at page 164, legislative power over mere opinion is forbidden, but it may reach people's actions when they are found to be in violation of important social duties, or subersive of good order, even when the actions are demanded by one's religion. This was articulated by Thomas Jefferson when he said:

> 'Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, *that the legislative powers of government reach actions only, and not opinions*, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced *he has no natural right in opposition to his social duties*.' (Emphasis added.) 8 Works of Thomas Jefferson 113. [Footnote omitted].

• • • • • • • •

"Thus, in *Reynolds v. United States*, this Court upheld the polygamy conviction of a member of the Mormon faith despite the fact that an accepted doctrine of his church then imposed upon its male members the *duty* to practice polygamy. And, in *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645, this Court

upheld a statute making it a crime for a girl under eighteen years of age to sell any newspapers, periodicals or merchandise in public places despite the fact that a child of the Jehovah's Witnesses faith believed that it was her religious *duty* to perform this work.

"It is to be noted that, in the two cases just mentioned, the religious practices themselves conflicted with the public interest. In such cases, to make accommodation between the religious action and an exercise of state authority is a particularly delicate task, id., 321 U.S. at page 165, 64 S.Ct. at page 441, because resolution in favor of the State results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.

• • • • • • •

"To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly limitless.

"Needless to say, when entering the area of religious freedom, we must be fully cognizant of the particular protection that the Constitution has accorded it. Abhorrence of religious persecution and intolerance is a basic part of our heritage. But we are a cosmopolitan nation made up of

people of almost every conceivable religious preference. These denominations number almost three hundred. Year Book of American Churches for 1958, 257 et seq. Consequently it cannot be expected, must less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test for determining whether the legislation violates the freedom of religion protected by the First Amendment." pp. 603-7.

This Court then affirmed the decision of the United States District Court for the Eastern District of Pennsylvania, 184 F.Supp. 352 (1959), dismissing the complaint after declaring that there was a sufficient state interest for the state and its people that there should be a uniform day of rest and the closing of all but a few limited types of businesses necessary for the general public interest. The State of Tennessee likewise has a sufficient interest involved in this matter to exclude ministers from the General Assembly, that being the separation of Church and State.

It is therefore respectfully submitted that because the grounds on which the decision of this cause depends are so insubstantial as not to need further argument, this Court should dismiss the appeal or, in the alternative, affirm the decision of the Supreme Court of Tennessee.

II

The Supreme Court of Tennessee has properly and correctly found that the call for the forthcoming Constitutional Convention, Chapter 848, Public Acts of 1976, which includes by reference Article IX, §1 of the Constitution of Tennessee, is fully consistent with the free exercise of religion, and Estab-

lishment Clauses of the First Amendment and Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

A. Free Exercise of Religion

The call for the Convention, under Chapter 848, Public Acts of 1976, including Section 4 of the Act, and the Constitution of Tennessee, Article IX, Section 1, are fully consistent with the free exercise of religion provided for by the First and Fourteenth Amendments of the Constitution of the United States.

The appellant McDaniel contends that the call for the Convention, Chapter 848, Section 4, Public Acts of 1976, and the Constitution of Tennessee, Article IX, Section 1, deprive him of the free exercise of his religion insofar as those provisions declare that "ministers of the Gospel and priests of any denomination" are ineligible to serve in either House of the Legislature. A review of the significant free exercise cases, however, reveals that these Tennessee provisions represent no infringement of appellee's right to believe. Moreover, although these provisions represent a minimal infringement of the appellant's right to act, that incidental burden is wholly justified by the governmental interest involved.

In the first place, while the right to believe is absolute, these provisions do not represent any interference with that right. In *Torcaso v. Watkins*, 367 U.S. 488 (1961), this Court invalidated a Maryland provision under which a "declaration of belief in the existence of God" was required as a qualification for public office. The plaintiff in that case obviously had no recourse but to either lose his job or profess a belief wholly inimical to his own religious tenets.

Because the free exercise clause is predicated on the protection of individual belief and action, it is necessary to show

some element of coercion in order to establish a violation thereof. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1965). Therefore, an enactment is not in violation of an individual's freedom of belief if it places no sanction on a religious belief or opinion, or if it does not force anyone to embrace a religious belief or to say or believe anything in conflict with his religious tenets, *Braunfeld v. Brown*, supra; see also *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Anderson v. Laird*, 466 F.2d 283 (D.C. C.A. 1972), *cert. den.* 409 U.S. 1076 (1972).

Viewed in this light, the Tennessee enactments in no way infringe upon the Rev. McDaniel's freedom to believe. We might assume that the appellant, as a Baptist minister, holds the beliefs and tenets of other Baptists. Nothing in the enactments impose a sanction for holding such beliefs or, as in *Torcaso*, supra, forces the appellant to say or believe anything inimical to his Baptist tenets. The Rev. McDaniel's disqualification is not grounded on his beliefs, but rather on the way he chooses to carry out those beliefs, on his actions. Therefore, the requisite element of coercion is simply not present to establish an infringement on the appellant's freedom to believe.

Admittedly, however, there is some infringement, but indirect, on the appellant's freedom of action. The appellant serves as a minister and his status as such disqualifies him from serving as a delegate to the Constitutional Convention. It is well established, however, that while the freedom to believe is absolute, freedom of action is not. *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940). The State may reject certain religious acts where the conduct poses some substantive threat to public safety, peace or order. *Sherbert v. Verner*, 374 U.S. 398 (1963). See, *Reynolds v. United States*, 98 U.S. 145 (1879); *Braunfeld v. Brown*, supra; *State ex rel. Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975), *cert. den.* 422 U.S. 954 (1976). In *Reynolds* and in *Swann*, the burden placed upon the individual was direct and harsh since the enactments in

those cases made a religious practice unlawful. Therefore, the State's interest in so doing must be substantial and compelling, and there must be a clear and present danger posed by a continuation of the practice. *Swann*, supra.

A different situation is presented where, as here, the practice itself is not unlawful, but where the law simply regulates a secular activity, and, as applied to an individual, operates so as to make the practice of his religious beliefs more expensive or inconvenient. *Braunfeld*, supra. In *Braunfeld*, the plaintiff, an Orthodox Jew shopkeeper, challenged Pennsylvania's Sunday Closing Laws. Since his religious tenets mandated that he keep his shop closed on Saturdays, Braunfeld claimed that the Sunday closing laws gave him an economic disadvantage as against his competitors and, in effect, penalized the free exercise of his beliefs. This Court, in upholding the statute, found a number of facts as persuasive. In the first place, although the state's original objective in passing the enactment was religiously motivated, the statute, in its current form, had the laudable secular goal of providing a uniform day of rest for all citizens. Secondly, the burden on the plaintiff was only indirect. The effect of the law was merely to inconvenience those members of the Orthodox Jewish faith who felt it necessary to work on Sundays. The enactments made no religious practice unlawful and did not affect all the members of any religious group. In such cases, where the goal is secular and the burden indirect, it would be unfair to require that the state show a compelling interest for the law. Rather the standard is far less rigid.

> "But if the state regulates conduct by enacting a general law within its power the purpose and effect of which is to advance the state's secular goals, the statute is valid despite its indirect burden on religious observance, unless the state may accomplish its purpose by means which do not impose such a burden."
>
> *Braunfeld*, supra, at p. 607

The appellees respectfully submit that following the *Braunfeld* analysis, the Tennessee enactments do not infringe upon the appellant's free exercise of religion or, more specifically, upon his freedom of action. The activity being rejected is a distinctly secular activity—that of serving in the general Assembly or as a delegate to the Constitutional Convention. It is entirely within the power of a state legislature to set the qualifications for its members. *Walker v. Yucht*, 352 F.Supp. 85 (D.C. Dela. 1972). Furthermore, while the original motivation for the enactment may have been religiously motivated—to ensure that ministers are not "diverted from the great duties of their functions,"—the enactment's current purpose and effect are distinctly secular—to ensure the necessary separation between church and state. Inasmuch as that separation is the touchstone of the First Amendment, it is surely a valid secular objective for any legislation, *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

Not only are the objectives of the enactments and the regulated activity both of a secular nature but, as in *Braunfeld*, the burden on the religious practice is indirect. The enactments do not make it unlawful for appellant to serve as a minister, nor do they impose any sanction on that activity. Furthermore, the provisions do not place a burden on all Baptists, or on the members of all religious groups. The burden falls only on those who feel it necessary to become members of the clergy. As to this latter group, the provision merely excludes them from one activity—that of serving on the State Legislature or as a delegate to the Constitutional Convention. While this may cause inconvenience or result in some sacrifice, it does not bar them from the practice of their religion. Surely, this sacrifice is not great compared with the dangers inherent in the entanglement of church and state.

Finally, as in *Braunfeld*, supra, there are no acceptable alternatives for the State to ensure the continuation of the requisite "wall of separation" between church and state. Ministers and

priests are, of necessity and by choice, *agents* of their churches and their congregations. While the layman may feel a duty to abide by the tenets of his religion, the minister or priest has a broader duty also to abide by the dictates of his superiors in the organized hierarchy of his church. This is not to say, of course, that his duty to his church will always be inconsistent with his duties as an elected representative, but it is to suggest that the potential for conflict is far greater with a priest and minister than it is with a layman. We must never forget that many of the original settlers were dissenters who wanted to escape from the tyranny of an organized state religion. The First Amendment, with its concomitant spirit of separation of church and state, was drafted with these people in mind. Certainly, the Tennessee enactments, insofar as they seek to preserve this essential separation, do not deprive the appellant of the free exercise of his religion.

B. The Establishment Clause of the First and Fourteenth Amendments

The call for the Convention, Chapter 848, Public Acts of 1976, including Section 4, and the Constitution of Tennessee, Article IX, Section 1, are fully consistent with the Establishment Clause of the First and Fourteenth Amendments of the Constitution of the United States.

The appellant McDaniel further contends that the Tennessee enactments, insofar as they penalize only Christian ministers and priests for assuming leadership roles, is a violation of the Establishment Clause of the First and Fourteenth Amendments to the Constitution of the United States.

The intention of this clause was to "erect a wall of separation between church and state," by insuring that the government did nothing to prefer one religion over another, or to aid or inhibit

one religion or all religions. *Everson v. Board of Education*, 330 U.S. 1 (1947). As appellant admits, one facet of this definition is aimed at prohibiting all sectarian bias on the part of the State. This concern has led to the interesting interplay between the Free Exercise Clause and the Establishment Clause. The enactment of affirmative legislation designed to inundate the free exercise rights of one group, may bring a legislature into conflict with the Establishment Clause insofar as the legislation gives to one group a special right or privilege. See, *O'Malley v. Brierley*, 477 F.2d 785, (3d Cir. 1973).

Contrary to the appellant's contention, there is no sectarian bias in favor of Christian ministers and priests in the Tennessee enactments. It can hardly be questioned that for the drafters of the Constitution of Tennessee, in their own limited frame of reference, the phrases "ministers of the Gospel and priests of any denomination" meant what the broader more inclusive term "clergy" means to us. (Webster's *New International Dictionary, 2d ed.* (1952) defines "clergy" as "the priesthood, or body of adepts of any religion."). Obviously, the framers of that enactment attempted a more inclusive class through their addition of the phrase, "priests of any denomination whatsoever." This semantic confusion does not render the enactment incapable of interpretation; nor does it raise entanglement problems. As the appellees point out, clergymen are the subject of numerous statutes relating to their exemption from such things as jury duty and the draft. Courts have obviously developed a considerable amount of expertise in interpreting such terms as "ministers," "priests," and "clergy." Because the Tennessee enactments apply to all "clergy," they demonstrate no sectarian bias.

A more difficult question is posed by the claim that the enactments might violate the Establishment Clause by favoring or inhibiting all religious. Under the three-pronged test proposed in *School Dist. of Abington Township v. Schempp*, supra, how-

ever, there is no "establishment" of religion. In the first place, the enactments represent the distinctly secular legislative purpose of preserving the separation of church and state. While it is arguable that the original purpose may have been more religiously motivated, *Braunfeld v. Brown*, supra, demonstates that what is controlling is the current purpose.

The primary effect of the legislation is neither the advancement nor inhibition of religion. In limiting the excluson only to clergymen of any religion, the enactments confer no benefit or detriment to "religion." It is inconceivable how any religious group in Tennessee would be hindered or helped by the mere fact that their clergy could not run for the state legislature. There is no nexus between the two. See: *Walz v. Tax Comm.*, supra. Indeed, the only possible effect of the enactments is that which serves as their objective—the assured separation of church and state.

Finally, the enactments represent no excessive government entanglement with religion. As was pointed out before, because of the substantial case precedent with regard to interpreting such terms as "ministers," "priests," and "clergy," there need not be any entanglement problems involved in determining who comes under the enactment's exclusion. Moreover, there is nothing in the enactments themselves that prohibits anyone from becoming a clergyman, or that dictates to religious groups whom they should appoint as clergy. Because the enactments fully comply with the *Schempp* test, and because they demonstrate no sectarian bias, they are not in violation of the Establishment Clause.

C. Equal Protection Under the Fourteenth Amendment

The call for the Convention, Chapter 848, Public Acts of 1976, including Section 4, and the Constitution of Tennessee, Article IX, Section 1, are fully consistent with the Equal Protection Clause of the Fourteenth Amendment.

The appellant McDaniel further contends that the Tennessee enactments are in violation of his right to vote and his freedom of association secured by the Fourteenth Amendment. The Tennessee enactments, however, infringe neither upon the appellant's right to vote nor upon his right of political candidacy as that right may be related to his freedom of association.

In the first instance, as in any Equal Protection case, it must be determined whether the Court should apply the rational basis test, or the more rigid strict scrutiny—compelling state interest test. The latter is generally applied only when the challenged state action affects some fundamental right, or where the state's classification is based on a suspect criteria. *Walker v. Yucht*, supra. The Appellees respectfully submit that the rational basis test is the appropriate test to apply in this case, and that applying such a test reveals that there has been no Equal Protection violation.

In support of this contention, it should be noted that there is no fundamental right to hold political office. *Turner v. Fouche*, 396 U.S. 346 (1970). In *Turner*, plaintiffs were denied consideration for appointments to the board of education because they were not freeholders. Since this classification, on the basis of wealth, constituted invidious discrimination, the Court, there, never went on to consider the question of which test should be applied.

Where, however, as in the case at bar, there is no fundamental right involved and no individous discrimination, courts will often consider the impact of the legislation. Since the right of political candidacy is often tied to the rights of voters (which are fundamental), courts will closely scrutinize that legislation that has a real and appreciable impact on the right of franchise. *Bullock v. Carter*, 405 U.S. 134 (1972). In *Bullock*, the United States Supreme Court strictly scrutinized Texas legislation which set inordinately high registration fees for primary candidates, be-

cause, as the Court found, that legislation substantially limited the field of candidates and had a particularly harsh effect on poor voters who were unable to contribute toward the registration fees of their candidates. Viewed in this perspective, *Bullock* "is merely a new application of the general axiom that statutory arrangements colliding with the right to vote in such a way as to burden the voting power of discrete minority groups must be closely scrutinized." *Walker v. Yucht*, supra.

As in *Walker*, which upheld a three-year residency requirement for certain candidates, there is no substantial impact in the case at bar, nor burden placed on any group of voters. The impact of the candidacy restriction is unrelated to the wealth of the candidate or the wealth of his supporters. Moreover, there is no evidence that any one group of voters would prefer the candidacy of a clergyman. Finally, because the restriction affects comparatively so few people, the restriction does not substantially limit voter choice. For these reasons, the rational basis test should be applied to determine the validity of the enactments.

In applying the rational basis test, it must be asked whether the classification has a reasonable basis for the achievement of a legitimate state goal. As has already been indicated, these enactments favored the laudable objective of the separation of church and state. Inasmuch as this is the touchstone of the First Amendment of the Constitution of the United States, it is obviously a legitimate state interest. Moreover, although it may be incapable of proof, there is no reason to assume that the enactments do not forward this objective. While it does not necessarily follow that a clergyman's duty to his superiors will conflict with his duty to the state, the potential for conflict is clear; there is certainly a sufficient nexus to justify the legislation. Finally, it is urged that the Court should determine its limited role in passing on matters so uniquely within the pur-

view of the Legislature. The Court, in *Walker*, was obviously cognizant of this, in noting,

> "Our role is not that of a 'super-legislature.' Instead, we confine our power, in cases of this kind, to determining whether the state's asserted interests are legitimate and whether the chosen means are related to the achievement of the State's goals. Any change in the Delaware Constitution in this regard should come, if at all, from the people of Delaware." p. 100
>
> *Walker v. Yucht*, supra.

The appellant's final contention that he has a right of political candidacy based on the fundamental right of freedom of association, is equally untenable. The principal support for appellant's contention is *Williams v. Rhodes*, 393 U.S. 23 (1968), which dealt with an Illinois statute which made it virtually impossible for candidates from any political party, other than the Republican and Democratic Parties, to get on the ballot. The right of political candidacy found therein was based on the right of individuals to associate for the advancement of political beliefs. Since the Rev. McDaniel's party was not discriminated against as a group, freedom of association is surely not at issue in this case.

It is, therefore, respectfully submitted that the Supreme Court of Tennessee has properly and correctly found that the call for the forthcoming Constitutional Convention, Chapter 848, Public Acts of 1976, which includes by reference Article IX, §1, of the Constitution of Tennessee, is fully consistent with the Free Exercise of Religion Clause and Establishment Clause of the First Amendment and the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, and that this Court should dismiss this appeal or, in the alternative, affirm the decision of the Supreme Court of Tennessee.

CONCLUSION

Based on the foregoing it is respectfully submitted that this appeal should be dismissed, or that the decision of the Supreme Court of Tennessee should be affirmed, because it has properly and correctly found that the call for the Constitutional Convention is fully consistent with the provisions of the First and Fourteenth Amendments of the Constitution of the United States.

Respectfully submitted,

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Certificate of Service

I hereby certify that copy of the foregoing pleading has been sent to the following:

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I further certify that when this pleading is printed, three copies of it will be sent to each of the aforementioned attorneys and appellee.

This 9th day of June, 1977.

/s/ KENNETH R. HERRELL

Assistant Attorney General
Attorneys for Appellees

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1427

PAUL A. McDANIEL,
Appellant,

vs.

SELMA CASH PATY, et al.,
Appellees.

On Appeal from the Supreme Court of the State of Tennessee

MOTION OF APPELLEE, SELMA CASH PATY, TO DISMISS APPEAL OR IN THE ALTERNATIVE TO AFFIRM

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IN THE

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PAUL A. McDANIEL,
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Appellees.

On Appeal from the Supreme Court of the State of Tennessee

MOTION OF APPELLEE, SELMA CASH PATY, TO DISMISS APPEAL OR IN THE ALTERNATIVE TO AFFIRM

QUESTIONS PRESENTED

I

Is the legislative call for the constitutional convention which incorporates the Tennessee Constitution, Article IX, Section 1, consistent with First Amendment provisions of the United States Constitution concerning the establishment of religion and the free exercise thereof?

II

Is the legislative call for the constitutional convention which incorporates the Tennessee Constitution, Article IX, Section 1, consistent with the Fourteenth Amendment provisions of the United States Constitution concerning equal protection?

III

Does the legislative call for the constitutional convention which incorporates the Tennessee Constitution, Article IX, Section 1, deny due process of law under the Fourteenth Amendment of the United States Constitution as being vague?

MOTION TO DISMISS OR AFFIRM

Appellee, Selma Cash Paty, moves that the appeal herein taken be dismissed or in the alternative that the decision of the Tennessee Supreme Court in the case of *Paty v. McDaniel*, be affirmed on the ground that the judgment below rests upon the interpretation of the highest appellate court of the State of Tennessee of the Constitution of Tennessee based upon the findings of a legitimate and substantial state interest and that judgment should not be disturbed.

This is an appeal from a decision of the Supreme Court of Tennessee rejecting appellant's contention that his disqualification pursuant to the Tennessee Constitution, Article IX, Section 1, as a delegate to the Tennessee limited Constitutional Convention is a denial of his federal constitutional rights to free exercise of religion, is an establishment of religion in conflict with the First Amendment, is a denial of his right to vote, is a violation of Equal Protection of the Laws, is based upon an unconstitutionally vague law, and subjects him to a religious test in order for him to qualify as a candidate.

I

The appellant contends that Article IX, Section 1 of the Constitution of the State of Tennessee deprives him of the right to the free exercise of religion guaranteed by the First and Fourteenth Amendments to the United States Constitution. The Legislative call, Public Acts 1976, Chapter 848, Section 4, established qualifications for the delegates to the limited constitutional convention the same as those for membership in the Tennessee House of Representatives.

> "SECTION 4. Any citizen of the state who can qualify for member in the House of Representatives of the General Assembly may become a candidate for delegate to the convention upon filing with the County Election Commission of his county a nominating petition containing not less than twenty-five (25) names of legally qualified voters of his or her representative district."

Article IX, Section 1 of the Constitution of Tennessee provides as follows:

> "*Section 1. Ineligibility of ministers and priests to seats in legislature.*—Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of souls, and ought not to be diverted from the great duties of their functions; therefore, no Minister of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature."

The basis of the opinion of the Tennessee Supreme Court in *Paty v. McDaniel*, 457 S.W.2d 987, was that service in the legislature is "purely secular activity", and the first premises of this brief is that there is no limitation on the free exercise of religion imposed by Article IX, Section 1. Service in the Tennessee Legislature cannot be considered to be a right to free exercise of religion guaranteed by the First Amendment under

the facts of this case. There is no allegation in the record of this case to indicate that appellant intends now, or ever, to leave his ministry because of his desire to serve as a delegate to the limited constitutional convention or to become at some future time a candidate for a seat in either House of the Tennessee Legislature. By the facts of the case it can be seen that, whatever burden appellant contends is imposed upon his free exercise, it is one that does not compulsively require the abandonment of any of his religious beliefs, which may well include being a minister of his faith but which, in the absence of proof in the record to support the claim, does not include being a convention delegate or member of the Tennessee General Assembly.

This Court has previously stated that "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203. It should be emphasized that if appellant's challenge is to succeed on free exercise grounds, the burden is upon him to show the coercive effect of the law *in his religion*.

Appellant contends in his brief that the Tennessee Constitution, Article IX, Section 1, presents him with a Hobson's choice between being a minister of his chosen faith or a member of the Tennessee Legislature. If the choice exists between a divine calling and a temporal one, his exercise of the option to continue to be a minister would not deny to appellant the right the free exercise of his religious belief, and his exercise of the option to be a political candidate would be the rational, uncoerced choice to leave the ministry in favor of a secular endeavor.

The degree of the burden upon the free exercise of religion should be actual rather than theoretical in order for a First Amendment challenge to be upheld, and the characterization as an "indirect" burden does little to clarify whether the Tennessee Constitution, Article IX, Section 1 is an impermissible burden

under the facts of this case. A definition of "indirect burden" in the context of free exercise clause cases was supplied by Chief Justice Warren in *Braunfeld v. Brown*, 366 US 599, as "legislation which does not make unlawful the religious practice itself." 366 US at 608. There are, admittedly, indirect burdens which have been found to inhibit the free exercise of religion to the extent that the questioned legislation unconstitutionally conflicted with First Amendment rights; however, these successfully challenged state actions were not found to have been sufficiently grounded upon such a compelling state interest as to warrant the inhibition of the exercise of the rights.

Such a case is *Sherbert v. Verner*, 374 U.S. 398, which decided upon free exercise grounds that a Seventh-Day Adventist was not ineligible for benefits under South Carolina's unemployment compensation law because of her unavailability for work on Saturdays. The Court found that conditioning the receipt of benefits upon the "appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." 374 US at 406. However, this factual situation is not analogous to appellant's case because the exigencies of survival demand that a member of our society have an income whether in the form of earnings or other compensation whereas service in the legislature is a voluntary activity, which involves no element of coercion. The choice between having an income and violating one's religious principles does not present a valid option.

If the Tennessee Supreme Court's decision is to withstand appellant's constitutional challenge, in the words of *Sherbert v. Verner, supra*, it must be either because appellant's disqualification from candidacy is not an infringement by the State of his constitutional rights of free exercise, or "because any incidental burden on the free exercise of appellant's religion must be justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate."

374 US at 403. Political candidacy is unquestionably a subject within the state's power to regulate, indeed the Constitution of the United States established certain qualifications for candidates for election to public office. Representatives must be 25 years of age, a citizen for 7 years and an inhabitant of the State from which he or she is chosen. (Article I, Section 2). A senator must be 30 years of age, a citizen for 9 years and an inhabitant of that state. (Article I, Section 3). No person holding any office under the United States may be a member of congress. (Article I, Section 6). Only natural born citizens may serve as President of the United States. (Article II, Section 1).

The Tennessee Supreme Court found that,

> "The effect of Tennessee's constitutional provision prohibiting service in the General Assembly is to advance the State's goal of maintaining the separation between church and state, an imperative, constitutionally equal to the free exercise mandate. In our opinion, it is far higher on the scale of legitimate state goals than the mere convenience of having everyone rest on the same day, which sufficed in *Braunfeld*." *Paty v. McDaniel*, 457 S.W.2d —.

A compelling state interest is to preserve the neutral governmental attitude toward religion which the Establishment Clause was intended to promote. Appellant argues that "no *state* interest in a 'wall of separation' which diminishes *federal* rights of free exercise is compelling." Appellant's Jurisdictional Statement, page 8. The case of *Braunfeld v. Brown*, supra decided precisely otherwise, holding as it did that there was a state interest in having a uniform day of rest in the state sufficiently compelling to permit the enforcement of Sunday closing laws to the admitted detriment of members of religious groups observing a Sabbath day other than Sunday, the religious observance of which is a federally guaranteed right.

On the other hand, in *Sherbert v. Verner*, the Court was not persuaded by the compelling state interest argument that unscrupulous claimants would feign religious objections to Saturday employment in order to avail themselves to the unemployment compensation fund because, in part, the objection had not been made in the state supreme court, and the Court was "unwilling to assess the importance of an asserted state interest without the views of the state court." 374 US at 407. Where, as here done by the Tennessee Supreme Court, the highest court of a state has approved a constitutional provision of that state unchallenged and unaltered for 180 years, its decision should not be disturbed without employing "the most critical scrutiny" in order to avoid radically restricting a state's legislative latitude. *Braunfeld v. Brown, supra.*

A workable test for determining the validity of laws in conflict with the free exercise clause was employed in *Braunfeld v. Brown*,

> "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden." 366 US at 607.

It is submitted, and the Tennessee Supreme Court found, that having ministers of any faith serve in the legislature would undermine the "compelling state interest" in perpetuating the First Amendment policy of maintaining the wall of separation of church and state by insuring that members of the legislature are not professionally concerned with an established religion. By inference from the *Paty v. McDaniel* decision, the Tennessee

court found that the nature of the call of a minister is to lead and teach the members of a particular religious group and to foster the precepts and doctrines of that group to which he is primarily devoted.

It is a permissible distinction between members of the ministerial profession and members of any other profession because of the reasonably forseeable conflict between a minister's divinely influenced mandate in the promotion of his religious views and the prohibition of the Establishment Clause. The policy sought to be perpetuated was stated in *Everson v. Board of Education*, 330 U.S. 1, as preserving civil liberty by rescuing "the temporal institutions from religious interference." The dual aspect of the constitutional inhibition in the area of legislation in matters of religion, operating as it does to maintain the wall of separation of church and state, affords self-protection to both institutions.

> "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." *Everson v. Board of Education*, 330 U.S. at 16.

It is plain that religious intrusion into the governmental sphere, as observed by this Court in *Abington School District v. Schempp, supra*, would ultimately have the same coercive effect as governmental interference with religion, indirectly compelling religious minorities to conform to the prevailing officially approved religion. Appellant argues that the apprehensions of the Tennessee Court that the candidacy of ministers to the legislative body in the state would result in a political cleavage along religious lines is unwarranted. (Appellant's Jurisdictional Statement, p. 20.) However, this Court has expressed the same type of apprehension concerning the combination of government and religion in *Abington School District v. Schempp, supra*:

> "The wholesome 'neutrality' of which the Court's cases speak this stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or all of the orthodoxies." 374 U.S. at 222.

In conclusion to the answer of appellee to the contentions that the decree of the Tennessee Supreme Court violates the First Amendment rights of appellant, it is urged that no burden on appellant's right of free exercise has been demonstrated; however, if any burden is found to exist, it is not a "coercive" burden on appellant's rights as they relate to the exercise of his religion. Appellant's claim that this state action is an establishment of religion exists only theoretically, and, likewise, appellant has not demonstrated how rights peculiar to him are adversely affected in respect to an establishment of religion. He is the only party before the Court claiming the infringement of constitutional rights, and the nature of his claim is not based upon a factual circumstance giving rise to any injury to him or an infringement of his fundamental rights by state action in the area of establishment of religion. There is lacking in the basis of appellant's claim "a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast v. Cohen*, 392 U.S. 83, 102.

II

Appellant contends that he has been denied Equal Protection in that he has been deprived of federally secured rights of voting and political candidacy as a result of the decree of the Tennessee Supreme Court. It should not be necessary to treat the questions of voting rights and political candidacy separately in this discussion, inasmuch as appellant's right to vote

for himself, presumably the candidate of his choice, depends upon his right to be a political candidate. The right to vote does not exist in a vacuum. The right to vote is exercisable only in regular elections with candidates qualified according to permissible state standards; therefore, the right of appellant to candidacy in the first place should be the controlling inquiry in this case. The object of appellant's claim that the questioned portion of the Tennessee Constitution is an infringement of his voting rights is to invoke the constitutional protections afforded the right to vote as compared to those protections applicable to the right to participate as a political candidate, the latter right having been correctly characterized as only "emerging". (Appelllant's Jurisdictional Statement, p. 24.)

The prevailing standard for determining the constitutional limits of a state's power over its own elections involves consideration of the "facts and circumstances behind the law, the interest which the state claims to be protecting, and the interest of those who are disadvantaged by the classification." *Williams v. Rhodes*, 393 U.S. 23, 30. The elimination of ministers as candidates for office in the law-making sector of Tennessee government is a permissible classification on the basis that the classification exists for the protection of an important state interest. The maintenance of a government free from the threat of religiously sectarian influence is a fundamental constitutional principal of the First Amendment and an important state interest, the promotion of which possibly involves the infringement to some degree of other valid fundamental rights of individuals.

Where the balancing of these competing state interests and individual rights involves the classification of individual or groups and results in the asserted loss of fundamental rights, certain tests have been formulated to determine if state action violating the Equal Protection Clause is permissible. The application of these tests involves looking to "the character of the classification in question; the individual interests affected by the classification;

and the governmental interests asserted in support of the classification." *Dunn v. Blumstien*, 405 U.S. 330, 335. A compelling state interest must be demonstrated in order for the classification to be constitutionally permissible where it infringes upon a constitutionally protected right, and without regard to whether any less stringent test may be applicable appellee contends that a compelling state interest has been demonstrated. As it has been previously articulated, the state interest in this case is certainly more compelling than in having a uniform day of rest as in *Braunstien v. Brown, supra*.

The maintenance of a secular legislature is a state interest of such magnitude as to distinguish this case from those cited by appellant dealing with filing fees, property requirements or minority parties, where the Court was unable to discern any significant state interest. See, *Lubin v. Panish*, 415 U.S. 709 (state interest eliminating frivolous candidates did not justify filing fee); *Turner v. Fouche*, 396 U.S. 346 (no justifiable state interest in freeholder qualifications for school board elections); *Williams v. Rhodes, supra* (no compelling state interest in restricting the ability of a minority party to gain a position on the ballot). Unlike these immediately preceding cases which involved protection of the rights of freedom of association directly affecting indigents, the arguable infringement in this case applies to a class upon whom it has not been demonstrated to have any substantial impact.

Other cases have found a compelling state interest in legislation dealing with the elective process, acknowledging that "the state's strong interest in maintaining the integrity of the political process" outweighed any restrictions imposed upon the right to vote. *Storer v. Brown*, 415 U.S. 724, 731. In *Jenness v. Fortson*, 403 U.S. 431, for example, the Georgia requirement that independent voters file a nominating petition signed by five percent of the electorate was upheld as reasonably related to the state's interest in the elective process.

The classification of which appellant claims is not an "invidious" one subject to constitutional challenge. The classification of ministers has been the subject of favorable class legislation in other contexts under both the Tennessee State law and under the federal law. One example was the exclusion of ministers from the draft under the Selective Service Act of 1967, 50 U.S.C. Section 456(g):

> "Regular or duly ordained ministers of religion, as defined in this title . . ., and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing theological or divinity schools in which they have been pre-enrolled, shall be exempt from training and service (but not from registration—under this title".

Ministers have also been given specific exemptions from taxation for certain types of income.

> 26 U.S.C.A. § 107. *Rental value of parsonages* in the case of a minister of the gospel, gross income does not include—
>
> (1) the rental value of a home furnished to him as part of his compensation: or
>
> (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home.
>
> 26 U.S.C.A. § 1402. (a) *Net earnings from self-employment.*—The term 'net earnings from self-employment' means the gross income derived by an individual from any trade or business carried on by such individual . . . except . . . (8) an individual who is duly ordained, commissioned, or licensed minister of a church or a member

> of a religious order shall compute his net earnings from self-employment derived from the performance of service described in subsection (c) (4) without regard to Section 107 (relating to rental value of parsonages), Section 119 (relating to meals and lodging furnished for the convenience of the employer), Section 911 (relating to earned income from sources without the United States), and Section 931 (relating to income from sources within possessions of the United States).
>
> 26 U.S.C.A. § 3401. (a) *Wages.*—For purposes of this chapter, the term 'wages' means all remuneration . . . for services performed by an employee for his employer, . . . except that such term shall not include remuneration paid —
>
> (9) for services performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

It is submitted that if a classification of ministers is not unconstitutionally arbitrary or invidious for the purpose of the statutes cited above, then that classification does not violate the Equal Protection Clause as applied to the Tennessee Constitution. Nor, is this arbitrary class legislation any more than the preventing a federal judge from being a member of the United States Congress under the United States Constitution, Article I, Section 6, is arbitrary class legislation. There is, of course, a legitimate and compelling state interest in maintaining the separation of powers by barring judges from service in the legislature, but this does not rank higher on the scale of legitimate state interests than separation of church and state.

III

Appellant raises a challenge to the decision below on the basis that the words "minister" and "priest" in the Tennessee Constitution, Article IX, Section 1, are unconstitutionally vague. As demonstrated by the Internal Revenue Code, the federal government has had no difficulty with the definition, and this terminology has not proven to be judicially unmanageable in the past.

Appellant demonstrates the vagueness by application of Article IX, Section 1, to situations which do not apply to a duly ordained and regularly functioning Baptist preacher. Such arbitrary and hypothetical applications of the constitutional provision are of intellectual interest only and are evasive of the issue of whether the section applies in the present situation. As this Court stated in *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 86 fn. 9, "it is not the sort of vagueness that leaves those subject to a statute uncertain about what is required of them." The Court further stated that "[i]n the case where applicability of the statute is uncertain, abstension is proper." *Id.*

In light of the fact that appellant's argument involves the application of Article IX, Section 1, and not its effect, it should be assumed that the Tennessee courts are able to define the term and to determine applicability as it relates to actual cases where the definition of the terms relate to real issues rather than to hypothetical situations. The Tennessee courts are certainly as equal to the task as the federal courts have been in construing the term "ministers" in such cases, for example, as *Dickinson v. United States*, 346 U.S. 389, and *Cox v. United States*, 332 U.S. 442.

IV

This Court should find that the Tennessee Constitution, Article IX, Section 1, as free from constitutional infirmities, thereby permitting the State of Tennessee to promote in its own manner the goal of maintaining the wall of separation of church and state. Whether, in comparison with alternative means of promoting that state interest, this is the wisest means available should not be the scale by which this law is to be measured. For, as this Court states in *Braunfeld v. Brown, supra*, "our concern is not with the wisdom of legislation but with its constitutional limitations." 366 U.S. at 608.

Respectfully submitted,

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Certificate of Service

Copies of this Motion of Appellee, Selma Cash Paty, to Dismiss Appeal or in the Alternative to Affirm have been served upon The Honorable Brooks McLemore, Attorney General of the State of Tennessee, Kenneth R. Herrell, Assistant Attorney General of Tennessee, counsel for appellees and upon Frederic S. LeClercq, and J. Thomas Mann, counsel for appellants by placing same in the United States mail with sufficient postage directed to their respective office addresses on this 13th day of June, 1977.

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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. A-12 (76-1427)

REV. PAUL A. McDANIEL,
Appellant,

v.

SELMA CASH PATY, a Resident of Hamilton County, Tennessee; SHIRLEY HASSLER, as Coordinator of Elections of the State of Tennessee; LYTEL LANDERS, as Chairman of the State Election Commission of Tennessee; RAY BLANTON, as Governor of the State of Tennessee; BROOKS McLEMORE, as Attorney General of the State of Tennessee; JOE C. CARR, as Secretary of State of Tennessee; JAMES HARPSTER, TOMMY POWELL, RICHARD HOLCOMB, JACK SEATON, as Members of the State Election Commission of Tennessee; CHARLES HINSON, Chairman of the Hamilton County Election Commission; CLAUDE CLARK, TOMMIE CARTER, JAMES PENLEY, ALBERT W. SECOR, as Members of the Hamilton County Election Commission; TOM MOORE, JR. as Registrar-at-Large for the Hamilton County Election Commission,
Appellees.

On Appeal from the Supreme Court of Tennessee

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Appellant,

v.

SELMA CASH PATY, a Resident of Hamilton County, Tennessee; SHIRLEY HASSLER, as Coordinator of Elections of the State of Tennessee; LYTEL LANDERS, as Chairman of the State Election Commission of Tennessee; RAY BLANTON, as Governor of the State of Tennessee; BROOKS McLEMORE, as Attorney General of the State of Tennessee; JOE C. CARR, as Secretary of State of Tennessee; JAMES HARPSTER, TOMMY POWELL, RICHARD HOLCOMB, JACK SEATON, as Members of the State Election Commission of Tennessee; CHARLES HINSON, Chairman of the Hamilton County Election Commission; CLAUDE CLARK, TOMMIE CARTER, JAMES PENLEY, ALBERT W. SECOR, as Members of the Hamilton County Election Commission; TOM MOORE, JR. as Registrar-at-Large for the Hamilton County Election Commission,
Appellees.

On Appeal from the Supreme Court of Tennessee

BRIEF FOR APPELLANT

OPINION BELOW

The opinion of the Tennessee Supreme Court is reported at 547 S.W. 2d 897 (Tenn. 1977).

JURISDICTION

The jurisdiction of the Supreme Court to review the final judgment of the Supreme Court of Tennessee is conferred by 28 U.S.C. § 1257(2). *See Torcaso v. Watkins*, 367 U.S. 488 (1961); *Sherbert v. Verner*, 374 U.S. 398 (1963).

QUESTIONS PRESENTED

I. Whether the legislative call for a limited constitutional convention (1976 Tennessee Public Acts, Chapter 848, Section 4 establishing the qualifications of delegates as the same as those for membership in the House of Representatives, thus invoking the Tennessee Constitution, Article IX, Section 1) deprives appellant of the free exercise of religion guaranteed by the First and Fourteenth Amendments of the United States Constitution.

II. Whether the legislative call for a limited constitutional convention is an establishment of religion in violation of the First and Fourteenth Amendments of the United States Constitution.

III. Whether the legislative call for a limited constitutional convention deprives appellant of the right to vote in violation of the Equal Protection Clause of the Fourteenth Amendment.

IV. Whether the legislative call for a limited constitutional convention deprives appellant of the right to be a candidate for public office in violation of the Equal Protection Clause of the Fourteenth Amendment.

V. Whether the legislative call for a limited constitutional convention deprives appellant of due process of law secured by the Fourteenth Amendment of the United States Constitution in that the Tennessee Constitution, Article 9, Section 1 is unconstitutionally vague.

VI. Whether the legislative call for a limited constitutional convention imposes a religious test as a qualification for office or public trust in violation of the United States Constitution, Article VI, Clause 3.

STATUTES INVOLVED

Tennessee Constitution, Article IX, Section 1, the validity of which is drawn in question, provides:

> "Ineligibility of ministers and priests to seats in legislature. —Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no Ministers of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature".

The provisions of the Tennessee Constitution, Article IX, Section 1, were made applicable as a qualification for election to the 1977 limited constitutional convention of Tennessee by 1976 Tennessee Public Acts, Chapter 848, Section 4, which provides:

> "Any citizen of the state who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for delegate to the convention upon filing with the County Election Commission of his county a nominating petition containing not less than twenty-five (25) names of legally qualified voters of his or her representative district. Each district must be represented by a qualified voter of that district. In the case of a candidate from a representative district comprising more than one county, only one qualifying petition need be filed by the candidate, and that in his home county, with a certified copy thereof filed with the Election Commission of the other counties of his representative district".

STATEMENT

Appellant, Reverend Paul A. McDaniel, pastor of the Second Missionary Baptist Church in Chattanooga, Tennessee filed as a candidate for delegate to the 1977 limited constitutional con-

vention from the 29th House District of Tennessee. On September 28, 1976 Selma Cash Paty, one of the appellees here, filed suit in the Chancery Court of Hamilton County against appellant and certain of the appellees requesting a declaration that appellant was disqualified to serve as delegate and an order striking appellant's name from the ballot under 1976 Tennessee Public Acts, Chapter 848 and the Tennessee Constitution, Article IX, Section 1.

The Chancery Court of Hamilton County on October 5, 1976 declared appellant eligible to seek the office of delegate and invalidated on First and Fourteenth Amendment grounds the provisions of 1976 Tennessee Public Acts, Chapter 848, and the Tennessee Constitution, Article 14, Section 1 as applied to appellant's candidacy for or service as delegate at the 1977 limited constitutional convention.

An appeal was taken to the Tennessee Supreme Court which on October 15, 1976 was remanded for failure of the record to reflect that the state attorney general had been made a party or served in accordance with Tennessee Code Annotated § 23-1107 and Rule 24.04 of the Tennessee Rules of Civil Procedure.

On October 21, 1976 appellant filed an amended answer and cross-complaint naming additional of the appellees as defendants in this case and seeking further relief under 42 U.S.C. 1983. The Chancellor certified appellant's amended answer and complaint as a class action on October 22, 1976. The answer of appellee Selma Cash Paty to appellant's amended answer and cross-complaint was filed October 22, 1976.

The Chancery Court of Hamilton County on October 22, 1976 again declared appellant qualified to seek the office of delegate to the 1977 limited constitutional convention from the 29th House District of Hamilton County and on October 25, 1976 entered final judgment and an order granting an appeal to the Tennessee Supreme Court.

During the pendency of the appeal in the Tennessee Supreme Court, the election of November 2, 1977 was held and appellant was elected as a delegate to the 1977 limited constitutional convention from the 29th House District of Hamilton County by the following vote: Paul A. McDaniel—4,570; Selma Cash Paty—2,944; Samuel Lee Doney—900; Ralph W. Timberlake —743.

On March 7, 1977 the Tennessee Supreme Court entered a decree and opinion reversing the judgment of the Chancery Court of Hamilton County and directing that an order be issued by the clerk of the Tennessee Supreme Court certifying to the Governor, the Secretary of State and the legislative body of Hamilton County that a vacancy for the position of delegate to the 1977 limited constitutional convention exists in the 29th House District, Hamilton County, by virtue of Reverend Paul A. McDaniel's ineligibility and adjudging costs against Reverend Paul A. McDaniel. On March 16, 1977 appellant filed a notice of appeal to this Court from the final judgment of the Tennessee Supreme Court.

Appellant applied for a stay of the Tennessee Supreme Court's decree of March 7, 1977 to Mr. Justice Stewart which was denied March 17, 1977 because no previous application had been made to the Supreme Court of Tennessee. On March 28, 1977 appellant filed an application for a stay from the Tennessee Supreme Court which on April 21, 1977 was granted for a period of 90 days from and after March 16, 1977. On June 20, 1977, the United States Supreme Court noted probable jurisdiction of this case. On June 21 appellant filed in the Tennessee Supreme Court an application for a stay pending disposition of this case in the Supreme Court of the United States. On June 28, 1977 the Tennessee Supreme Court denied appellant's application for a stay. Appellant then applied for a stay of the Tennessee Supreme Court's decree of March 16, 1977 to Mr. Justice Stewart which was granted July 6, 1977.

ARGUMENT

I

Appellant has developed the constitutional claims to be presented in this case and has criticized the opinion and holding of the Tennessee Supreme Court at some length in the Jurisdictional Statement. Since it would serve no useful purpose to repeat the arguments made in appellant's Jurisdictional Statement here, appellant would like to incorporate those arguments by reference. In this brief, appellant will respond to whatever arguments may have been raised in the opinion and holding of the Tennessee Supreme Court and in appellees' motions to dismiss which were not addressed in appellant's Jurisdictional Statement. Secondly, appellant will present an historical argument relating the history of clergy disqualification from civil office in England and the United States for the purpose of establishing that whatever legitimate interests may have once supported these clauses no longer exist.

Counsel for Appellee Paty argues that a ministerial classification is not invidious since it is used in other contexts under state and federal law. Motion of Appellee Paty to Dismiss at 12-13. Appellant has not suggested that a ministerial classification is impermissible for all purposes. There are constitutionally significant distinctions between a clergy disqualification clause and a draft exemption or tax preference. The most important distinction is that the clergy disqualification clause is a punitive one which penalizes free exercise of religion, whereas the purpose of the draft exemption is to enhance free exercise of religion in the United States—to "guard against a flock being without its shepard." *Fitts v. United States*, 334 F.2d 416 at 421 (5th Cir. 1964). *See also United States v. Bittinger*, 422 F.2d 1032 (4th Cir. 1969). Exclusion of the rental value of parsonages from gross income can be justified upon the secular ground

that the value of shelter in which the taxpayer is required to live as a condition of his employment should not be treated as income. *Cf. Waltz v. Tax Commission*, 397 U.S. 664, at 687 (1970) (Brennan, J. concurring). Secondly, the exclusion of the rental value of parsonages from gross income avoids precisely the same kind of entanglement problems the Court wishes to avoid in *Waltz v. Tax Commission, supra* at 674. Thirdly, the exclusion of the rental value of the parsonage enhances the free exercise of religion by in much the same way as the draft exemption approved by the Fifth Circuit in *Fitts*—it enhances the accessibility of the clergy to their parishoners.

The claim of the attorney general of Tennessee that "there is no evidence that any one group of voters would prefer the candidacy of a clergyman," Tenn. A.G., Motion to Dismiss 22, appears questionable in view of the substantial margin by which appellant won election. Juris. Statement 5. The remaining arguments made by the Attorney General in his motion to dismiss appear to be fully joined by appellant's arguments in the jurisdictional statement.

The Tennessee Supreme Court overruled appellant's assignments of error made to the chancellor's dismissal of the amended complaint and class action on behalf of voters and candidates in future legislative and constitutional convention elections. *Paty v. McDaniel*, 547 S.W. 2d 897 at 909-10 (Tenn. 1977).

The Tennessee Supreme Court relied exclusively upon the authority of *Story v. Walker*, 218 Tenn. 605, 404 S.W. 2d 803 (1966). *Story* is distinguishable from the present case on at least two grounds. First, appellant's amended complaint, styled as a "counter complaint, cross complaint and third party complaint" was properly certified on October 22, 1976, as a class action by the Chancellor. Juris. Statement A.62-63. *Cf. Sosna v. Iowa*, 419 U.S. 393 (1975). In contrast, *Story* was decided before the Tennessee Rules of Civil Procedure permitting class

actions under Rule 23 were adopted. The Tennessee General Assembly has declared that all laws in conflict with the Tennessee Rules of Civil Procedure "shall be of no further force or effect." TENN. CODE ANN. § 16-116. The Tennessee Rules of Civil Procedure were patterned on the federal rules and Tennessee courts are "influenced by the [federal] case law dealing with . . . issues in the construction and interpretation of our [state] rules." *Hixon v. Stickley*, 493 S.W. 2d 471 (Tenn. 1973). Appellant contends that the Tennessee court refused in this case to accord appellant's class action the ordinary weight it would be accorded under state law because of the federal character of appellant's claims. Discrimination by state courts against litigants asserting federal claims in state courts raises questions of federal law and permits federal review of what would otherwise afford an adequate and independent state ground of decision. *See Testa v. Katt*, 330 U.S. 386 (1947).

The Tennessee Supreme Court's novel extension of the state ripeness doctrine in *Paty v. McDaniel*, 547 S.W. 2d 897 (Tenn. 1977), reinforces appellant's claim that the state courts refused to accord the class action certification the weight it would generally be accorded under state law. The claim in *Story* was "abstract, theoretical or based on a contingency which may or may not arise" because unless or until Johnson City, Tennessee amended its zoning ordinance permitting non-residential use of the servient estate subject to the restrictive covenant limiting land use for residential purposes, there would be no need to determine the applicability or validity of the restrictive covenant for which appellant in *Story* had sought enforcement by his action for declaratory judgment. The question presented in *Story* was demonstrably abstract and would become ripe only upon a change of law. In contrast, no change of law is required in the instant case to bar Rev. McDaniel and others within his properly certified class from seeking legislative office in Tennessee or voting for candidates for legislative office. The question is, therefore, live and should be resolved.

Important policy considerations support this Court's determining the validity of TENN. CONST. art. IX, sec. 1 as well as the validity of 1976 TENN. PUB. ACTS, c. 848, sec. 4. First this Court has recognized the special difficulties posed by election cases through its relaxation of the mootness doctrine in the "capable of repetition, yet evading review" line of authority. *See*, for example, *Dunn v. Blumstein*, 405 U.S. 331 (1972). The policy considerations supporting a relaxation of the mootness doctrine in *Dunn* appear to apply with equal force to the question of ripeness presented here. Secondly, for the Court to refuse to entertain the validity of TENN. CONST. art. IX, sec. 1 on the ground that *Story* affords an adequate independent ground for decision precluding federal review would simply invite additional litigation should this Court solely invalidate 1976 TENN. PUB. ACTS, c. 848, sec. 4, excluding clergy from the 1977 Tennessee constitutional convention. The mootness problem may prove an insuperable barrier to the vindication of clergy refused ballot status in future Tennessee legislative races. It should be remembered that the unfavorable disposition of appellant's claims by the Tennessee Supreme Court may have defeated Rev. McDaniel's effort to serve as a delegate, but for a fortuitous event—namely, that in this case the chancellor declared that Rev. McDaniel's name should be placed on the ballot. Neither Rev. McDaniel nor other clergy interested in seeking legislative office in future elections can be assured of the favorable trial disposition appellant was granted here. The danger exists should this Court refuse to entertain the question of the validity of TENN. CONST. art. IX, sec. 1 in this case that a future election will be held in which clergy are denied ballot status in a legislative race and no final judgment can be obtained until after the election. Should the courts ultimately vindicate the claimed constitutional rights, they would be faced with the equally distasteful alternatives of disrupting the state electoral process through ordering a new election or failing to afford meaningful relief to a litigant with an approved federal claim. Thirdly, the merits of the question appear to be squarely

presented in this case and there appears to be no good reason to avoid the question. To decline to reach the validity of TENN. CONST. art. IX, sec. 1 would be a disservice to the important state and federal interest of affording an efficient, economical means of resolving disputes. It would appear wasteful of the resources of future clerical candidates for legislative office as well as the time of courts and lawyers to require additional litigation of this question. State economic interests would appear to favor the Court's considering the validity of TENN. CONST. art. 14, sec. 1 since attorney fees are generally awarded to the prevailing party under 42 U.S.C. § 1973*l* (e). Significantly, no important federalism values stand in the way of the constitutional validity of TENN. CONST. art. IX, sec. 1. Appellant here has taken the route preferred of late by some members of this Court. *See*, for example, *Wisconsin v. Constantineau*, 400 U.S. 433, at 439-40 (1970) (Burger, C.J.), joined by Blackmun, J., *dissenting*, *id.* at 443-44 (Black, J., joined Blackmun, J., *dissenting*). Appellant's federal claims have been presented initially to the state courts which have been given every opportunity of vindicating appellant's federal claims. Appellant's claim is a federal one arising under 42 U.S.C. § 1983. The predominant interests which underlie state procedural policies concerning the scope of class actions in the state courts and the application of state ripeness doctrine in this case are federal and call for correspondingly less deference to state interests in procedural uniformity. *See Dice v. Akron, Canton and Youngstown RR*, 342 U.S. 359 (1952). *Dice* considerations should apply with special force where, as here, the application of state class action and ripeness policies applied to defeat appellant's federal claims are novel, discriminatory and do not appear to be warranted in state law. There is no justification in the policies which underlie our federalism or in common sense for this Court to decline to reach the merits of TENN. CONST. art. IX, sec. 1.

The Tennessee Supreme Court adjudged costs against Rev. McDaniel. Appellant urges that, should he prevail in this litigation, this case be remanded with the direction that costs, including reasonable attorney's fees, be awarded appellant. Federal law specifically authorizes an award of attorneys fees to the prevailing party in actions such as this one under the Voting Rights Act of 1975, §14(3), 42 U.S.C. § 1973*l*(e). Assuredly, the clergy disqualification clause appellant challenges "operates impermissibly to dilute the voting strength of an identifiable element of the voting population." *Dallas County v. Reese*, 421 U.S. 477, 488 (1975); *Bradley v. Richmond School Board*, 416 U.S. 696 (1974). *See also Lytle v. Election Comm.*, 541 F.2d 421 (4th Cir. 1976).

II

A Brief History of the Disqualification of Clergy From Civil Office in the United States and England.

The Tennessee constitutional convention of 1796, in disqualifying ministers from legislative office, did not write upon a clean slate. In fact, the roots of the Tennessee Constitution, Article IX, Section 1, lie deeply embedded in English history. A complete understanding of the purpose and effect of Tennessee's clergy disqualification clause is impossible without reference to English history and to the practice in other states before and after the American Revolution. Research by counsel has led to the discovery of a far more substantial history relating to the disqualification of ministers from legislative office than was heretofore suspected. With the exception of A. STOKES, 1 CHURCH AND STATE IN THE UNITED STATES 622-28 (1950) and E. Swen, "The Disqualification of Ministers in State Constitutions," 26 WM. AND MARY HIST. Q. MAG. 69 (1917) and F. Swancara, "The Surviving Religious Test," 18 St. Louis L. Rev. 105 (1933), very little scholarly attention appears to have been devoted to this topic. The paucity of the legislative history from the 1796 Tennessee constitutional convention originally

adopting the challenged disqualification reinforces the need to look beyond the convention itself to establish the purpose of the disqualification.

The Tennessee disqualification of ministers from legislative office was not unique. Eight states adopted minister disqualification clauses in their state constitutions prior to Tennessee: N.C. CONST., art. XXXI (1776);[1] VA. CONST. (1776);[2] MD. CONST., art. 37 (1776);[3] DEL. CONST., art. 29 (1776);[4] GA.

[1] N.C.CONST., art. 31 (1776) provides:
that no clergyman, or preacher of the gospel, of any denomination, shall be capable of being a member of either the Senate, House of Commons, or Council of State, while he continues in the exercise of the pastoral function.

This provision was omitted from N.C. CONST. (1868).

[2] VA. CONST. (1776) provides:

[A]ll ministers of the gospel, of every denomination, be incapable of being elected members of either House of Assembly or the Privy Council.

This provision was continued in VA. CONST., art III, sec. 7 (1830) and VA. CONST., art. IV, sec. 7 (1850) and VA. CONST., art. IV, sec. 7 (1864); but omitted in VA. CONST. (1870).

[3] MD. CONST. art. 37 (1776) provides:

[N]o person, holding a place of profit or receiving any part of the profits thereof, or receiving the profits arising on any agency, for the supply of clothing or provisions for the Army or Navy, or holding any office under the United States, or any of them—or a minister or preacher of the gospel, of any denomination—shall have a seat in the General Assembly, or Council of State.

This provision was continued in MD. CONST., art. III, sec. 11 (1950) and was omitted in MD. CONST. (1864). However, the provision was readopted in MD. CONST., art. III, sec. 11 (1867).

[4] DEL. CONST., art 29 (1776) provides:

[N]o clergyman or preacher of the gospel, of any denomination, shall be capable of holding any civil office in this state, or of being a member of either of the branches of the legislature, while they continue in the exercise of the pastoral function.

This provision was continued in DEL. CONST., art. 8, sec. 9 (1792) and DEL. CONST., art. 7, sec. 8 (1831); but was omitted in DEL. CONST. (1897).

CONST., art. LXII (1777);[5] N.Y. CONST., art. XXXIX (1777);[6] S.C. CONST., art. XXI (1778);[7] KY. CONST., art. II, sec. 26 (1792).[8] In addition, five other states adopted minister disqualification clauses subsequent to Tennessee: LA. CONST., art.

[5] GA. CONST., art. LXII (1776) provides:

No clergyman of any denomination shall be allowed a seat in the legislature.

This provision was continued in GA. CONST., art. I, sec. 18 (1789), but omitted in GA. CONST. (1798).

[6] N.Y. CONST., art. 39 (1777) provides:

And whereas the ministers of the gospel are, by their profession, dedicated to the service of God and the care of souls, and ought not to be diverted from their great duties of their function; therefore, no minister of the gospel, or priest of any denomination whatsoever, shall at any time hereafter, under any pretense or description whatever, be eligible to, or capable of holding, any civil or military office or place within this state.

This provision was continued in N.Y. CONST., art VII, sec. 4 (1821) and was dropped from N.Y. CONST. (1846) and did not appeal in subsequent New York constitutions.

[7] S.C. CONST., art XXI (1778) provides:

Whereas the ministers of the gospel are by their profession dedicated to the service of God and the cure of souls, and ought not to be diverted from the great duties of their function, therefore no minister of the gospel or public preacher of any religious persuasion, while he continues in the exercise of his pastoral function, and for two years after, shall be eligible either as governor, lieutenant governor, a member of the senate, house of representatives, or privy council in this State.

This provision was continued in S.C. CONST., art. 1, sec. 23 (1790) and S.C. CONST., art. 1, sec. 30 (1865), but omitted in S.C. CONST. (1868).

[8] KY. CONST., art. I, sec. 24 (1792) provides:

No minister of religious society, member of Congress, or other person holding any office of profit under the United States or this commonwealth, except attorneys at law, justices of the peace, and militia officers, and coroners, shall be a member of either house during his continuance to act as a minister, in Congress, or in office.

This provision was continued in KY. CONST., art. II, sec. 26 (assembly), art. IV, sec. 6 (governor); KY. CONST., art. II, sec. 27 (assembly), art. III, sec. 6 (governor) (1850); but omitted from KY. CONST. (1890).

2, sec. 22 (1812);[9] Miss. Const., art. VI, sec. 7 (1817);[10] Mo. Const., art. 3, sec. 13 (1820);[11] Fla. Const., art. VI, sec. 10 (1838);[12] Texas Const., art. III, sec. 27 (1845).[13] Twelve of the fourteen states adopting clauses disqualifying ministers repealed or deleted these clauses from their state con-

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[9] La. Const., art. II, sec. 22 (1812) provides:

> No person while he continues to exercise the functions of a clergyman, priest or teacher of any religious persuasion, society or sect, shall be eligible to the general assembly, or to any office of profit or trust under this state.

A similar provision was contained in La. Const., art. III, sec. 6 (governor); both provisions were continued in La. Const., Title 2, art. 29 (1845) (assembly); La. Const., Title 3, art. 42 (governor); but were omitted from La. Const. (1852); however, both were continued in La. Const., Title III, art. 36 (1864) (assembly); La. Const., Title IV, art. 46 (governor), but were omitted from La. Const. (1868).

[10] Miss. Const., art. 6, sec. 7 (1817) provides:

> Ministers of the gospel being, by their profession, dedicated to God and the care of souls, ought not to be diverted from the great duties of their functions; therefore no minister of the gospel, or priest of any denomination whatever, shall be eligible to the office of governor, lieutenant-governor, or to a seat in either branch of the general assembly.

This provision was omitted from Miss. Const. (1832).

[11] Mo. Const., art. III, sec. 13 provides:

> No person while he continues to exercise the functions of a bishop, priest, clergyman, or teacher of any religious persuasion, denomination, society, or sect whatsoever, shall be eligible to either house of the general assembly; nor shall he be appointed to any office of profit within the state, the office of justice of the peace excepted.

This provision was omitted from Mo. Const. (1865).

[12] Fla. Const., art. VI, sec. 10 (1838) provides:

> No minister of the gospel shall be eligible to the office of governor, senator, or member of the house of representatives of the state.

This provision was omitted from Fla. Const. (1865).

[13] Republic of Tex. Const., art. v, sec. 1 (1836) provides:

> Ministers of the gospel being, by their profession, dedicated to God and the care of souls, ought not to be diverted from the great duties of their functions; therefore, no minister of the gospel or priest of any denomination whatever, shall be eligible to the office of the executive of the republic, nor to a seat in either branch of the congress of the same.

This provision was continued in the state's first constitution in Tex. Const., art. III, sec. 27 (1845) and Tex. Const., art. III, sec. 27 (1886); but omitted from Tex. Const. (1868).

stitutions. The Maryland clause was invalidated in *Kirkley v. State of Md.*, 381 F. Supp. 327 (D. Md. 1974). Tennessee, alone among the fifty states, has retained a constitutional clause disqualifying ministers from legislative office.

1. English common law origins of clergy disqualification for civil office: practices and usages of the house of commons.

The purpose of the Tennessee constitutional provision disqualifying ministers from legislative office arises from sentiments which were commonly held in this country and in England in the late eighteenth and early nineteenth centuries. The provenance and true meaning of the minister disqualification clauses adopted by Tennessee and other American states reach deep into English history.

The minister disqualification clauses in the constitutions of Tennessee and other states can be traced to the English practice excluding clergy from the house of commons. The Tennessee Supreme Court acknowledged that the Tennessee clergy disqualification clause was derived from the constitutions of North Carolina and the lost state of Franklin. *Paty v. McDaniel*, 547 S.W. 2d 987, at 907 (1977). The North Carolina clergy disqualification clause, as well as similar clauses in other early state constitutions, could be considered declaratory of prevailing pre-revolutionary colonial and English practice.

Blackstone in his *Commentaries* said that the clergy were not qualified "to be *elected* members of the house of commons

. . . for they sit in the convocation."[14] As authority for his conclusion, Blackstone relied upon the "law and custom of parliament, declared by the house of commons" and made reference to three instances in which clergy had been excluded from the house of commons. The three examples cited by Blackstone involved the exclusions of Alexander Newell, prebendary in Westminister in 1553; John Robson, a minister returned for Morpeth in Northumberland in 1620 and Dr. James Craddock from the borough of Richmond in 1661.

With reference to the exclusion of Alexander Newell, the Commons Journal for October 13, 1553 states:

> It is declared by the Commissioners, that Alex. Newell, being Prebendary in Westminster, and thereby having voice in the Convocation House, cannot be a Member of this House; and so agreed by the House; and the Queen's Writ to be directed for another Burgess in that place. 1 H.C. JOUR. 27 (1553).

On February 8, 1620, John Robson was excluded from commons. The house of commons journal for that date states:

> Sir Geor. Moore proceedeth with this Report for the third Question, concerning the Return of . . . a Minister, returned for Morpeth in Northumberland.
>
> Sir Edw. Coke:—When he Speaker, one put out: And that he saw Alexander Nowell (though he had not *curam animarum*) put out, because of the Convocation-house.

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[14] W. BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 174 (Sharswood ed. 1860) (Book 1 at 175 in original). Blackstone's lectures, originally delivered in 1753, had an enormous influence on late eighteenth century American political leaders, especially lawyers. *See, e.g.*, W. Holdsworth, *Aspects of Blackstone and his Commentaries*, 4 CAMP. L.J. 261 (1932). Sixteen of the original subscribers to the first American edition of BLACKSTONE'S COMMENTARIES afterwards became signers of the Declaration of Independence and six were members of the Constitution Convention. D. LOCKMILLER, SIR WILLIAM BLACKSTONE 170 (1938).

> Upon Question, Resolved, His Return void; and a new Writ to issue, for a new Election. 1 H.C. JOUR. 513 (1620).

Commons opposed the return of Robson, a "Clerk," because he "had or might have a Voice in the Convocation-house; [and] therefore [was] not fit to be admitted here". 1 H.C. JOUR. 511 (1620). Mr. Hackwyll agreed that the reason clergy were ineligible to serve in commons was that they have "a Voice [in] or attendeth . . . the Convocation". 1 H.C. JOUR. 512 (1620).

Another reason for excluding clergy from commons was that as "lords spiritual" they were represented in the house of lords. Thus, in the debates on the exclusion of Robson, Sir. H. Poole remarked that there was "[n]o Englishman, but to be either of the Upper or Lower House." 1 H.C. JOUR. 512 (1620).

In the debates on the exclusion of Robson, Sir Edward Coke offered a third reason for the exclusion of clergy from commons. Trial in England must be "*per pares*"—by one's peers. 1 H.C. JOUR. 512 (1620). Trial of the nobility must be by the nobility and the trial of dukes by dukes. Coke noted that one must be "[e]ither of the Upper or Lower House, except some few cases". He admitted that knights were not to be tried by knights. According to Coke, a "Banerette cannot serve here, in respect of the Honor he hath at Funerals . . ."

Coke's trial-by-peers argument for the exclusion of clergy was consistent with prevailing Engish constitutional theory in the sixteenth century. *See*, for example, T. SMITH, DE REPUBLICA ANGLORUM (L. Alston ed., 1906). The "most striking feature of Smith's book was that it regarded the constitution as consisting mainly of the courts and represented parliament itself as the highest court in the kingdom." G SABINE, A HISTORY OF POLITICAL THEORY 449 (1960).

A third clergyman, Dr. James Craddock, was excluded from commons in 1621. The commons journal for that date states:

Serjeant Charleton reports, from the Committee of Privileges and Elections, touching the Election for the Borough of Richmond in the County of Yorke, That it appeared to them, that Dr. Craddock was in Holy Orders; and that Mr. Wandesford had the majority of Voices present at the Election: And the Opinion of the Committee, That Dr. Craddock was uncapable of being elected a Burgess for the Borough; and that Mr. Wandesford was duly elected, and ought to sit as Burgess for the said Borough of Richmond.

Resolved, That this House doth agree with the Committee, That Dr. Craddock was a person uncapable to be elected, and his election void: And that Mr. Wandesford was duly elected a Burgess for the said Borough of Richmond, and ought to sit in this House: And that the Clerk of the Crown, or his Deputy, do attend this House with the Return; and do erase out the name of Dr. Craddock, and insert the name of Mr. Wandesford.

Which was, the next day, done at the Clerk's Table. 8 H.C. JOUR. 346 (1621).

Additional extracts from the journals of commons pertinent to the eligibility of clergy to sit in commons were collected by a select committee in 1801 "appointed to examine the journals of this House and Records of Parliament, for Precedents respecting the Eligibility of Persons in Holy Orders." COMMITTEE ON THE ELIGIBILITY OF PERSONS IN HOLY ORDERS, H.C. REPORT 150 (1801) (microfilm) (hereinafter cited Commons Report of 1801). (A typewritten summary of the portions of the Commons Report of 1801 which are written in Norman French and medieval Latin have been lodged with the Court and provided to opposing counsel.) The Commons Report of 1801 was occasioned by the election of Rev. John Horne Tooke, an ordained priest of the Established Church, and led to the enactment of a statute, declaratory of English law, excluding from commons ordained priests, deacons or ministers

The Clergy Disqualification Act, 41 GEO. III, c. 63 (1801). This statute has subsequently been construed to apply to all who have "received episcopal ordination." *In re Macmanaway* [1951], A.C. 161, at 178 (P.C.). The Commons Report of 1801 made reference to several additional extracts from the journals indicating the ineligibility of clergy to sit in commons. Commons Report of 1801, at III, §3, *See* 1 H.C. JOUR. 989 (1604) (remarks of Mr. Tate and Sir George Moore); 1 H.C. JOUR. 459 (1604). (remarks of Richard Williamson, Mr. Whitlock and Mr. Finch).

The Commons Report of 1801 also included a reference to the case of Mr. Edward Rushworth who was made a deacon in 1780 and was returned to commons in 1784. Nonetheless, Mr. Rushworth was declared to have been "duly elected." 40 H.C. JOUR. 31-32, 241-42, 463, 551, 561 (1784). Counsel for Mr. Rushworth had "rested the strength of his case on the supposed distinction between the office of a priest and a deacon." 35 PARL. HIST. ENG. 1323 at 1365 (1801) (remarks of Earl Temple). *But see* VA. H. JOUR., Jan. 8, 1830 (microfilm) in which a Methodist deacon, Mr. Humphrey Billups, was excluded from legislative office in Virginia on the ground that *deacons* fell within the "spirit" of the clause in Virginia's constitution disqualifying *ministers* from legislative office.

The committee preparing the Commons Report of 1801 made a search "into all the Returns to Writs issued for the election of members to serve in Parliament, from the earliest period in which they are extant." 14 H.C. REP. 150 (1801) (microfilm). The report at part III listed sixty-two persons who had been returned to commons between 34 Edward I (1306) and 14 George II (1741) who "could furnish any presumption of [being] individuals in Holy Orders." *Ibid*. Each of these persons appear to have a religious or a university title such as "clericus", "doctor of laws", "doctor of civil laws", "master of laws", "dean", "Chancellor to the Right Reverend

Father in God the Lord Archbishop of Canterburys Grace", and "Doctor of Laws, Master of the Court of Requests". The committee stated that it was "fully aware that many of them are well known to be civilians only." *Ibid.* The committee also asserted that at least one member of commons returned with the religious title of Dean, Christopher Parkins, had been granted the benefice of the Queen along with a dispensation recognizing that he had not been admitted in "any sacred or other Orders." *Ibid.*

In the middle ages, the terms, "Clerc", "Clercq" and "Clericus" were ambiguous. *See* A. J. GREIMAS, DICTIONNAIRE DE L'ANCIEN FRANCAIS 118 (Larousse, 1968), which indicates that the old French word, "Clerc", had three separate meanings, namely: (1) Student, (2) Cleric as opposed to layman and (3) Learned person. *See also* 35 PARL. HIST. ENG. 1362 (1801) (remarks of Earl Temple).

The Commons Report of 1801 also included the case of Sir Thomas Haxley along with the names of individuals in holy orders who may have been returned as members of the house of commons but reported that "no such name occurs amongst [the returns]." *Ibid.* It would appear that Sir Thomas Haxley, although admittedly a cleric, was not a member of commons but had only written a letter to commons suggesting that the king's household expenses were too extravagant and should be diminished. *See* Commons Report of 1801, at 159-60 (translated summary lodged with Court).

It is unclear whether clerics ever sat in commons. One historian has suggested:

> Anciently, all the free men of England, or at least those that held of the crown in chief, came to parliament: and then the inferior clergy had writs as well as the superior; and the first of the three estates of the kingdom were the bishops, the other prelates, and the inferior clergy. But when the

> parliament was divided into two houses, then the clergy made likewise a body of their own, and sat in convocation, which was the third estate. But the bishops having a double capacity, the one of ecclesiastical prelature, the other of being the king's barons, they had a right to sit with the lords as a part of their estate, as well as in the convocation. And though, by parity of reason, it might seem that the rest of the clergy, being freeholders as well as clerks, had an equal right to choose or be chosen into the house of commons; yet, whether they were ever in possession of it, or whether, according to the clause *praemonentes* in the bishops' writ, they were ever a part of the house of commons, is a just doubt. G. BURNET, 2 HISTORY OF THE REFORMATION OF THE CHURCH OF ENGLAND 97-98 (1829) (hereinafter BURNET'S HISTORY).

Although the question of whether the lower clergy ever sat with commons is clouded by doubt, *see* 2 BURNET'S HISTORY 96-102, it is apparent that this right had been lost as early as the mid-sixteenth century, since during that period the clergy of the lower house of the convocation twice petitioned the Archbishop of Cantebury that they be permitted to sit in commons. The first petition urged:

> . . . that according to the ancient custom of this realm, and the tenour of the king's writ for the summoning of the parliament, which be now, and ever have been, directed to the bishops of every diocess, the clergy of the lower house of the convocation may be adjoined, and associate with the lower house of the parliament; or else, That all such statutes and ordinances as shall be made concerning all matters of religion and causes ecclesiastical, may not pass without the sight and assent of the said clergy. G. BURNET, 2 HISTORY OF THE REFORMATION OF THE CHURCH OF ENGLAND: A COLLECTION OF RECORDS AND ORIGINAL PAPERS, Pt.

II, Nos. 16-17 at 171-72 (1829) (hereinafter BURNET'S RECORDS).

The second petition acknowledged the convocations could only be "assembled by the king's writ", that canons were subject to "the king's most royal assent" and that no canons would be executed which were "repugnant to the king's prerogative royal, or the customs, laws, or statutes of this realm." *Id.* at 172. These acknowledgements simply reflected the laws through which Henry VIII had established complete royal dominion over the Established Church to the excusion of the See of Rome. *See* 25 HENRY VIII, c. 19 (1533); 27 HENRY VIII, c. 25 (1535). It has been suggested that "from the acknowledgement by the clergy . . . of the kings supremacy, we may date the non-existence of the clergy as a separate and distinct estate of the kingdom." 35 PARL. HIST. ENG. 1357 (1801) (remarks of Earl Temple).

Burnet observed that "though this design of bringing the inferior clergy into the house of commons did not take at this time [viz., when the petitions were presented by the lower house of the convocation to the Archbishop of Cantebury] yet it was again set on foot in the end of Queen Elizabeth's reign, and reasons were offered to persuade her to set it forward; which not being then successful, these same reasons were again offered to King James, to induce him to endeavor it." 2 BURNET'S HISTORY 98.

The petition of the lower clergy to Queen Elizabeth and King James is reprinted at BURNET'S RECORDS 173 (No. 18). The petition recites that in "former times, when causes ecclesiastical were either not at all, or else very rarely treated of in that assembly commons], the clergy were thought men must meet to consult and determine of the civil affairs of this realm." *Id.* at par. 1. The petition reasoned that if church-matters were to be debated in commons, "how much more necessary it is now than

it was in former times, that some of the clergy be there present . . . *Id.* at par. 3. The petition explained the "causeless separation" of the clergy from commons: "the king being offended with some of them, did so grievously punish the whole body." *Id.* at par. 4. In the petition presented to King James, the fourth paragraph explained the clergy's exclusion from commons was occasioned by the "clergy falling into a premunire." *Id.* editor's note. The *praemunire* must have consisted in violations of the act of 16 RICH. II, c. 5 (1392). *See also* 25 HENRY VIII, c. 19. (1533). Burnet discounts the *praemunire* argument as being "not credible." *See* 2 BURNET'S HISTORY 98.

The petition included a strong equal protection argument with a distinctly modern appeal against the exclusion of clergy:

> Though the clergy and the universities be not the worst members of this commonwealth, yet in that respect they are of all other in worst condition; for in that assembly every shire hath their knights, and every incorporate town their burgesses, only the clergy and the universities are excluded. *Id.* at par. 6.

The petition also contains an argument from political legitimacy or due process which is as persuasive today as it was when uttered more than three hundred years ago:

> The wisdom and justice of this realm doth intend, that no subject should be bound to that law, whereunto he himself (after a sort) hath not yielded in his consent; and the clergy and the universities may now be concluded by law, without their consent, without their just defense, without their privity. *Id.* at par. 7.

The thirteenth paragraph of the petition may furnish an explanation for the parliamentary hostility to the clergy serving in commons during the seventeenth and eighteenth centuries: that the presence of clergy in commons would assure a number

> . . . in that assembly, that ever will be most ready to maintain her prerogative, and to enact whatsoever may make most for her highness safety and contentment, as the men that next under God's goodness do most depend upon her princely clemency and protection. *Id.* at par. 13.

The petition concluded with the intimation that were clergy admitted to commons, they might counterpoise the nobodys who have power to reduce the king's budget requests tenfold. *Id.* at par. 15. Plainly, the opposition to the seating of clergy in commons was based to a considerable extent on the apprehension that the clergy would "support the prerogative of the crown in contradistinction to the liberties of the people." 35 PARL. HIST. ENG. 1360-61 (1801) (remarks of Earl Temple). There was substantial basis in fact to support the apprehensions of commons leaders of the royal prerogative. The Tudor kings—the "real founders of despotic government in England"—

> . . . convoked Parliament irregularly and limited its sessions to brief periods; they interfered with elections and packed the two houses with their own favorites; and they cajoled, flattered or bullied the members as the case might require in order to obtain their support. E. BURNS and P. RALPH, 2 WORLD CIVILIZATIONS 5 (1954).

The record of the Stuarts was no better. *Id.* at 5-7.

Thus, it can be observed that one of the strongest governmental interests supporting the disqualification of clergy in England —apprehension of undue legislative influence of the crown— could never have been viable in any American state after the Revolution. In England, the king had vast power over the clergy of the Established Church. *See*, for example, 25 HENRY VIII, c. 19 (1533). The king's powers over the benefices of the clergy was a patronage power not unlike that of our Presidents or state governors over their political appointees. The argument against the seating of clergy in commons was often based on the need

for preserving the "purity" or "independence" of commons—essentially a conflict-of-interest argument. See, for example, 35 PARL. HIST. ENG. 1367, 1376 (1801) (remarks of Earl Temple and Chancellor Addington). With the repudiation of the monarchy in the American Revolution, one of the strongest policies supporting the disqualification of clergy—the need to protect against undue royal influence—ceased to have weight in any American state.

For twenty years, 1641-61, an act of parliament disqualified the clergy from the exercise of all temporal authority. The Act "Disenabling all Persons in Holy Orders to exercise any Temporal Jurisdiction or Authority", 16 CHARLES I, c. 27 (1641),[15]

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[15] Because the Act is not printed in Statutes at Large, it is reprinted below:

> Whereas Bpps and other Persons in Holie Orders ought not to be intangled wth secular Jurisdiccon (the Office of the Ministery being of such greate Importance that it will take upp the whole Man) and for that it is found by long experience that theire intermeddling wth secular Jurisdiccons hath occasioned great Mischiefes and Scandall both to Church and State His Matie out of His religious care of the Church and Soules of His People is gratiously pleased that it bee Enacted And by Authority of this present Parliam' bee it Enacted That noe Archbpp or Bishopp or other Person that now is or hereafter shall be in Holy Orders shall att anie time after the Fifteenth day of February in the yeare of our Lord one thousand six hundred fourty-one have anie Seate or Place Suffrage or Voice or use or execute anie Power or Authority in the Parliaments of this Realme nor shall bee of the Privy Councell of his Matie His Heires or Successors or Justice of the Peace of Oyer and Terminer or Gaole Delivery or execute anie Temporall Authority by virtue of anie Comission But shall bee wholy dishabled and be encapable to have received or execute anie of the said Offices Places Powers Authorities and Things aforesaid And bee it further Enacted by the Authority aforesaid That all Acts from and after the said fifteenth day of February wch shall be done or executed by anie Archbishopp or Bishopp or other Person whatsoever in Holy Orders and all and everie Suffrage or Voice given or delivered by them or anie of them contrarie to the Purport and true Meaning of this present Act shall be utterly void to all Intents Construccons and Purposes. 14 H.C. REP. 161 (1801) (microfilm).

was repealed during the second year of the Restoration. 13 CHARLES II, c. 2 (1661).

The preamble to the Clergy Disqualification Act of 1641 recited that it is "found by long experience that their [bishops and other persons in holy orders] intermedling with secular Jurisdictions hath occasioned great Michiefs and Scandall." 14 H.C. REP. 161 (1801) (microfilm). It has been suggested that if the clergy

> . . . never had sat there, how could the act have possibly stated that inconveniences had arisen from it? This act was repealed in 1661, and it was worthy of notice, that the preamble of the repealing statute recited that the act of 1641 had made several objectionable alterations in the laws and customs of parliament, a reasonable proof at this parliament, a reasonable proof at this distance of time that the act of 1641 had made several objectionable alterations in the laws and customs of parliament, a reasonable proof at this distance of time that the act in question had, amongst other things, invaded the constitution of parliament by declaring that persons in holy orders, were ineligible; and at all events, since their exclusion clearly originated with the act of 1641, which the latter statute repealed, it seemed impossib'e to maintain that they did not become eligible again, and no law since had been passed to declare them incapable of sitting in the House of Commons. 35 PARL. HIST. ENG. 1397 (1801) (remarks of Mr. Erskine).

The response to Mr. Erskine's argument is that the Act of 1641 "was made against the bishops though the clergy were included by name." 35 PARL. HIST. ENG. 1396 (1801) (remarks of the Attorney General). It has also been observed that Dr. Craddock was excluded "not under the general law, but under a particular statute, which was afterwards repealed." 35 PARL. HIST. ENG. 1398 (1801) (remarks of Mr. Erskine). In rebuttal, it has been pointed out that Dr. Craddock was not "declared ineligible

under the Act of 1641, for that act was repealed six months before his election was decided", 14 H. C. REP. 1398 (1801) (microfilm) (remarks of the Attorney General).

The similarities between the Clergy Disqualification Act of 1641 and the disqualification clauses adopted by Tennessee and other American states is apparent. The clergy disqualification act of 1641 went further than English practice subsequent to 1661 and further than the disqualification clauses of most American states. The 1641 English statute disqualifies clergy from the exercise of "Anie Temporall Authority". A similar disqualification appeared in the draft of the Tennessee Constitution presented January 30, 1796. JOUR. OF TENN. CONST. CONV. OF 1796, at 18. (Clergy ineligible for "any civil or military office or place of trust within the state"). On February 1, 1796 the proposed Tennessee clergy disqualification clause was amended to limit the disqualification of clergy to "either branch of the legislature." *Id.* at 23. This amendment was consistent with eighteenth century English practice since it was conceded that clergymen "had always been placed in all the commissions of the peace throughout England." 35 PARL. HIST. ENG. 1397-98 (1801) (remarks of Mr. Erskine).

The preamble of the Clergy Disqualification Act of 1641 also established a pattern followed by Tennessee and several other American states. The Act of 1641 attempted to justify the exclusion of the bishops and other persons in holy orders from the exercise of any temporal authority for three reasons: (1) That the Office of the Ministry is of such great importance that it will take up the whole man. (2) That it is found by long experience that the intermeddling of bishops and others in holy orders with secular jurisdiction has occasioned great mischief both to Church and state and (3) that the act is prompted by religious care for the Church and the souls of the people. In a similar vein, the preamble of the Tennessee clergy disqualification clause seeks to legitimate the disqualification because "Ministers of the Gospel

are by their profession, dedicated to God and the Care of Souls." *Accord*, J. LOCKE, 6 WORKS 172-73 [1692] (1823).

Can we say of these preambles: "The Lady doth protest too much, methinks." W. SHAKESPEARE, HAMLET, ACT III, Sc. 2, Line 242. Richard Marius, professor of history at the University of Tennessee, Knoxville and a specialist in the English history of the reformation and rennaissance has observed that the Clergy Disqualification Act of 1641 was

> . . . passed not against the lower clergy, but to get the bishops, who had enormous wealth and power, out of politics. It was done partly in pique against the king. The Act of 1641 was an anti episcopal and anti-royal statute enacted by Puritans. The king's allies were the bishops. The purpose was to put the king in his place by punishing his closest allies, the bishops. Prof. Richard Marius to Frederic S. Le Clercq, July 26, 1977.

The punitive provisions of the Act of 1641 may have been cloaked in language of great solicitude for the church to forestall the day when the bishops might observe the authors of the act at the scaffold. The most probable intention of the Act of 1641 was to stew the bishops in their own juice. Query whether or not the Tennessee clergy disqualification clause was a mock heroic, tongue-in-cheek veil for anti clericism? The *effect* of the Tennessee clergy disqualification clause is indisputably punitive, even if that were not its purpose. The clause compromises the fundamental voting rights and free exercise rights of the clergy so substantially that one can surely say of its framers—with such friends, the Tennessee clergy needs no enemies.

Alternatively, if one accepts the preamble to the Tennessee clergy disqualification clause, it must be conceded that the declared purpose of the statute is religious. A plausible argument

can also be made that the effect of the act of 1641 was to reinforce and support ecclesiastical law, the bishopric charge in the ordination of priests in the Established Church of England and the Holy Bible. The Act of 1641 had a religious effect because it reinforced Canon LXXVI of the ecclesiastical law adopted in 1604. Canon LXXVI provides

> Ministers at no time to forsake their calling. No man being admitted a Deacon or Minister, shall from thencefoorth voluntarily relinquish the same, nor afterward use himselfe in the course of his life, as a Layman, upon paine of Excommunication. And the names of al such men so forsaking their calling, the Church-wardens of the Parish where they dwell shall present to the Bishop of the Diocesse, or to the Ordinarie of the place, having Episcopall Jurisdiction. CONSTITUTIONS AND CANNONS ECCLESIASTICAL, LXXV (*sic.*) (1612) (microfilm) (*See also* 35 PARL. HIST. ENG. 1379 (1801) (remarks of Chancellor Addington).

Likewise, the Act of 1641 had a religious effect because it reinforced the liturgy of the Established Church of England. The bishop of the Established Church is directed in the ordination of priests to charge each priest thusly:

> *. . . to forsake and set aside, as much as they may all Worldly Cares and Studies. It is hoped that they have clearly determined by God's Grace, to give themselves wholly to this Vocation and as much as lieth in them to apply themselves wholly to this one thing, and to draw all their Cares and Studies this way, and to this end . . .* G. BURNET, A DISCOURSE OF THE PASTORAL CARE 116 (1692) (microfilm) (emphasis in original).

The priests of the Established Church must further promise upon ordination that they "*will be diligent in . . . laying aside the Study of the World and the Flesh. Id.* at 121 (emphasis in original).

Bishop Burnet observes that the laying aside of the study of the world and the flesh by ordained priests

> . . . carries on that great Notion of the *Pastoral Care*, which runs through this whole *Office*; that it is to be a Man's entire Business and is to possess both his thoughts and his time. *Ibid.* (Emphasis in original)

Thus, the clergy disqualification clauses in the Act of 1641 reinforced "The Vows and Promises Priests make before they can be Ordained." *Ibid.*

The Tennessee law has a religious effect strikingly similar to the Act of 1641. Whereas the Act of 1641 had the effect of reinforcing the canon law and the liturgy of the Established Church, the Tennessee clergy disqualification clause gave the force of law to the religious practices and teaching of the Presbyterians faith whose Scotch-Irish adherents dominated the 1796 Tennessee constitutional convention. *See*, WORKS OF JOHN KNOX 519 (D. Laing ed. 1966) and J. Henneman, "Recent Tennessee History of Tennesseans", 4 SEWANEE REV. 439 (1896).

Yet a third religious effect of the clergy disqualification clauses of the Act of 1641 and of the Tennessee constitution as well is that they reinforce scriptural authority. *See Acts* 6:2-4 which provides:

> And the twelve summoned the body of the disciples and said, "It is not right that we should give up preaching the word of God to serve tables. Therefore, brethern, pick out from among you seven men of good repute, full of the spirit and of wisdom, whom we may appoint to this duty. But we will devote ourselves to prayer and to the ministry of the word."

See also the twentieth chapter of *Matthew*.

The above quoted passage from *Acts* is often cited as the Biblical authority for the exclusion of clergy from civil office. *See*, for example, J. LOCKE, 6 WORKS 172 (1823).

It is illuminating to consider the clergy disqualification clauses from a rhetorical perspective. Robert W. Glenn, associate professor of speech at the University of Tennessee, Knoxville, has suggested that the preambles of the Act of 1641 and of the clergy disqualification clause in the Tennessee constitution are closely related to two classical rhetorical techniques: *benevolentia* and *concessio*. *Benevolentia* involves the defusing of an opponent's objections through praise. *Concessio* involves the defusing of an opponent's argument by conceding those aspects of the argument which are irrelevant, thus creating an image of fairness when, in fact, all points given away are non-germane. These argumentative forms

> . . . can be commonly found in discourse by spokesmen of entrenched powers who are trying to rationalize their opposition to the sharing of that power with those out of power. What better way to do that than to compliment those whom you oppose, to praise their virtues, to mention positively the contributions they are making in whatever service they are performing. Professor Robert Glenn to Frederic S. Le Clercq, July 26, 1977.

Professor Glenn has stated that the preamble of the Act of 1641 and the clergy disqualification clause of the Tennessee constitution use

> . . . God as the master symbol. If a rhetorician can successfully link or identify a master symbol with the cause that he is arguing, then the audience is obliged to accept the cause because to deny the cause is to deny the master symbol.
>
> If God established a relationship between man and woman or church and state, then to argue for a readjust-

ment of that relationship is to suggest that God was wrong or to deny God's plan. Prof. Robert W. Glenn to Frederic S. Le Clercq, July 26, 1977.

The use of authority symbols such as the God symbol in the preamble to the Tennessee clergy disqualification law has been explained by Gerth and Mills:

> Those in authority within institutions and social structures attempt to justify their rule by linking it, as if it were a necessary consequence, with moral symbols, sacred emblems, or legal formulae which are widely believed and deeply internalized. These central conceptions may refer to a god or gods, the 'votes of the majority,' the 'will of the people,' the 'aristocracy of talents or wealth,' to the 'divine right of kings,' or to the allegedly extraordinary endowment of the person of the ruler himself.
>
> Various thinkers have used different terms to refer to this phenomenon: Mosca's 'political formula' or 'great superstitutions,' Locke's 'principle of sovereignty,' Sorel's 'ruling myth,' Thurman Arnold's 'folklore,' Weber's 'legitimations,' Durkheim's 'collective representations,' Marx's 'dominant ideas,' Rousseau's 'general will,' Lasswell's 'symbols of authority,' or 'symbols of justification,' Mannheim's 'ideology,' Herbert Spencer's 'public sentiments'—all testify to the central place of master symbols in social analysis . . .
>
> H. GERTH AND C. MILLS, CHARACTER AND SOCIAL STRUCTURE: THE PSYCHOLOGY OF SOCIAL INSTITUTIONS 277 (1953).

Professor Glenn has observed that authority figures do not use the *concessio* or *benevolentia* argument against

> . . . all aspirants to power. It is much more common to find the powerless discredited as uneducated, mentally feeble, unprepared to share power—e.g., George Fitzhugh on slaves in the 1850's, Albert Beveridge on the Phllippinos in 1898, George Wallace on Southern blacks in the 1960's . . . The argument we were discussing is probably used when the powerless group is sufficiently large (women) or respected (clergy) that a general audience will not accept the discrediting strategy. So, if the aspiring group cannot be discredited, relegate them to a closely circumscribed realm of duties which are praised as of the highest value to society but which leave the essential power and property relations unaffected.
>
> Prof. Robert W. Glenn to Frederic S. Le Clercq, July 26, 1977.

Professor Michael Osborn of the Department of Speech at Memphis State University has suggested that the Act of 1641 and the Tennessee clergy disqualification clause alike involve an

> . . . abuse of hyperbole. The office of the clergyman is exaggerated in order to justify the conclusion that he should not be doing anything else. Prof. Michael Osborn to Frederic S. Le Clercq, July 26, 1977.

Sir Edward Coke wrote in his INSTITUTES that

> [n]one of the clergy, though he be of the lowest order, are eligible to be knight, citizen or burgess of parliament, because they are of another body, *viz.* of the convocation. 4 INSTITUTES OF THE LAWS OF ENGLAND 47 (1644)

Coke cited as authority "Alex Nowels case, who after was deane of Paul's being a prebend." *Ibid.* Thus, the two foremost and most widely read authorities on the English law in seventeenth (Coke) and eighteenth (Blackstone) centuries agreed that clergy could not sit in commons. The drafters of the clergy disqualification clauses of the early American state constitutions

doubtless relied in part upon the authority of Coke and Blackstone. Assuredly, members of commons supporting The Clergy Disqualification of 1801 relied very heavily upon the authority of Coke and Blackstone. *See*, for example, 35 PARL. HIST. ENG. 1366 (remarks of Earl Temple), 1375 (remarks of Chancellor Addington), 1400 (remarks of Mr. Gragge) (1801). Indeed, the eminence of Coke and Blackstone as commentators on the common law and the English constitution have given their works independent force in the shaping of the constitutions of England and America.

The English practice of excluding clergy from commons probably arose within the context of more general policies against dual office holding. The exclusion of clergy has been defended by reference to classical notions of symmetry: "That clergy are not eligible to parliament, nor laymen to Convocation." 35 PARL. HIST. ENG. 1366 (1801) (microfilm) (remarks of Earl Temple). It has also been asserted that to admit the clergy to commons would "create a class of men enjoying double privileges"—the privileges of convocation and of commons. *Id.* at 1367. One could not hold office both in the house of lords and commons. Coke observed that "[n]one of the judges of the kings bench, or common pleas, or barons of the exchequer that have judicial places can be chosen knight, citizen or burgess of parliament . . . because they be affiants in the lord's house . . ." *Ibid.* The writ summoning the Coventry Parliament of 6 Henry IV (1404) went so far as to exclude those holding the office of lawyer as a result of which it has ever after been styled the "lack-learning" parliament. *Ibid.* By special order of the house of commons, Coke reported that persons holding the office of attorney general were excluded from parliament. Thus, the exclusion of clergy can be seen as a special instance of the broader policy against dual office holding. In England, both civil and ecclesiastical offices were held through the crown and, in that context, a policy disqualifying individuals from holding two

public offices may have much to commend it. The implementation of a policy against dual office holding by means of a clergy disqualification clause is utterly devoid of rational basis in the United States where ecclesiastical offices are not bestowed by the crown or the state, as are the offices of the Established Church in England, but are rather completely private positions.

In the United States, a policy of disestablishment has been mandated by the Establishment Clause of the First Amendment. One can look with interest to the impact of non-establishment upon commons' clergy disqualification policy. Only the episcopally ordained clergy are excluded from commons. *See In re Macanaway* [1951], A.C. 161 (P.C.). Thus, in the English commons today, "all Non-conformist ministers and also clergy of the Disestablished Church in Wales may now sit." 3 STEPHEN'S COMMENTARIES ON THE LAWS OF ENGLAND 355 (L. Warmington ed., 1950). *See* 28 HALSBURY'S LAWS OF ENGLAND, Pt. 3, sec. 2, par. 546 at 336 (1959) *and* 45 HALSBURY'S STATUTES OF ENGLAND 1601 at par. 10 (3) (1976). The English practice of permitting non-episcopal disestablished clergy to sit in commons is offered to this Court as persuasive authority for invalidating the clergy disqualification clause in the Tennessee constitution. Since our Establishment Clause guarantees that ecclesiastical offices shall be private, not public, the policy against dual office holding of public officers has no place as applied to clergy in the United States. The continuing English policy of disqualifying disestablished, episcopally ordained clergy from commons can be explained on grounds not applicable to the United States—namely, protection of the Established Church.

Both Coke and Blackstone reasoned that clergy could not sit in commons because they sat in convocation. The convocation in England was a "miniature of parliament". W. BLACKSTONE, COMMENTARIES, chap. 7, par. V at 279 (1860). Convocations originally were part of the Parliament of England so

that canons passed by convocations on ecclesiastical matters within the assent of the king bound the whole realm. *See Bird v. Smith*, Moore 781, 72 Eng. Rep. 903 (K.B. 1606) (a translation of this opinion from Norman French has been lodged with the Court and provided to opposing counsel), *overruled*, *Middleton v. Croft*, 2 Str. 1056, 93 Eng. Rep. 1030 (K.B. 1737). It has been observed subsequently from the Queen's Bench that the "historical reasons [for *Bird*] remain true as history and indeed cannot be denied." *Queen v. Archbishop of York*, 20 Law Rep. 744 (Q.B. 1888). Thus, for the purposes of legal history, it can be established that prior to 1736 the prevailing view in England was that

> . . . the Canons of the Church made by the convocation and the King without Parliament will bind in all matters ecclesiastical as well as by Act of Parliament, because they say that by Common Law each bishop in his diocese, archbishop in his province and convocation, house in the nation can make canons to bind in their limits and for this reason the convocation of the clergy was a form of the Parliament of this realm, but each brought his peculiar function with him into the convocation house. And a clergyman cannot now be of the Parliament House of Commons nor a temporal man be of the Convocation of the Clergy, as Coke cites, that it was resolved by both houses in conference together in the year 21 Hen. 8 so that when the Convocation makes canons on things belonging to them, and the king confirms them, they will bind the entire realm. *Bird v. Smith, supra* (translation).

Convocation is

> . . . [p]robably in some shape older than Parliament; certainly at the time of Edward I and Edward II there were attempts made, partially and temporarily successful, to incorporate it into Parliment. *Queen v. Archbishop of York*, 20 Law Rep. 744, 746 (QB 1888).

The summons of the Clergy to Parliament included in Part I of the Commons Report of 1801, 14 H.C. Rep. 150 (1801) (microfilm), (*see* lodging of translated summary) reinforce the consultative role of the English clergy through convocation. However, the "separation of Convocation and Parliament has been complete since the days of Richard II, if not Edward III." *Queen v. Archbishop York*, 20 Law Rep. 744, 746 (1888). As early as 15 Edward III (1341) the rolls of Parliament related that "men of the Holy Church who hold nothing by barony and who are not accustomed to sit in Parliament, will pay the tithe." 14 H.C. Rep. 154 at col. 2, sec. 32 (1801) (translation).

In Convocation, the clergy

> . . . not only passed canons with the King's consent, but taxed themselves, which like many a right once earnestly contended for as a privilege, became in lapse of years a burden, and was finally extinguished about 1665 in consequence of a verbal and wholly informal agreement between Archbishop Sheldon and Lord Clarendon who was at that time Lord Chancellor. *Queen v. Archbishop of York*, 20 Law Rep. 744, 746 (1888).

Thus, it can be seen that unlike the lords spiritual who have always sat conjointly with lords temporal in the house of lords, the lower clergy were separated from commons perhaps as early as the mid-fourteenth century. The representation of lower ecclesiastical offices in the Convocation with its powers to tax and to promulgate canon law became established as a ground for the exclusion of those eligible for its offices from commons. As the power of Convocation diminished or shifted to commons, the English clergy responded with the petitions submitted to Queen Elizabeth and James I.

There is not now, nor has there ever been in the United States, any counterpart of the convocation in England. Dele-

gation of the powers of governance to ecclesiastical authority is incompatible with the Establishment Clause of the First Amendment. Yet, historically, the principal reason for the disqualification of the English clergy from commons was grounded in their right to participate in convocation. It is perhaps an ironic commentary on the vital role imitation assumes at constitutional conventions that as many as fourteen of the United States in their early state constitutions adopted clergy disqualification clauses the principal historical justification of which had begun to lose its vitality almost 100 years before the American Revolution.

The clergy disqualification clauses in the early American state constitutions doubtless reflected also the legitimate concern of the newly independent states that no church occupy the "adulterous" relationship with the state that the Established Church had in England. T. PAINE, AGE OF REASON (1794). The disestablishment clauses in the early American state constitutions—*see*, for example, N.C. CONST., art. XXXIV (1776) —and the Establishment Clause of the First Amendment both reflect the emerging nation's interest in depoliticizing religion. It should be recalled that seven of the clergy disqualification clauses—including the North Carolina clause from which the Tennessee clause was immediately derived according to the Tennessee Supreme Court—were adopted between 1776 and 1778. Their adoption *preceded* the Establishment Clause of the First Amendment by more than a decade. The clergy disqualification clauses adopted by states in their first state constitutions in the wake of the Declaration of Independence were doubtless intended to reinforce parallel state disestablishment or free exercise policies. For example, the disestablishment and clergy disqualification clauses appear in the same article of the first Delaware Constitution. *See* DEL. CONST. of 1776, art. 29. The North Carolina clergy disqualification clause (upon which the Tennessee clause is reputed to have been based) "copied with slight changes" from the earlier Delaware clause. E. Ketcham,

"The Sources of the North Carolina Constitution of 1776" 6 N.C. HIST. REV. 229 (1929). Most of the seven states adopting clergy disqualification clauses between 1776 and 1778 also contemporaneously adopted policies disestablishing the church or permitting free exercise of religion, at least for protestant Christians. Policies of disestablishment or free exercise were adopted in DEL. CONST., art. 29 (1776) (disestablishment); N.C. CONST., art. XXXIV (1776) (disestablishment); N.Y. CONST., art. XXXVIII (1777) (free exercise); VA. CONST., sec. 16 (1776) (Bill of rights) (free exercise), GA. CONST., art. LVI (1777) (free exercise). *But see* S.C. CONST. art. XXXVIII (1778) (establishment of Christian Protestant religion); *cf.* MD. CONST., art. XXXIII (1776) (allowing tax for support of Christian religion). Massachusetts had an established church as late as 1833, MASS. CONST. of 1780, art. III, *as amended*, art. of am. XI (1833), but by the mid-nineteenth century, disestablishment policies had taken root in each of the United States. The clergy disqualification clauses could be justified as interim measures intended to insure the success of state disestablishment or free exercise policies. Once the success of state disestablishment policies was assured, most states could and did repeal their clergy disqualification clauses. Whatever legitimacy clergy disqualification clauses may have claimed during the precarious revolutionary and post revolutionary period when the states were first attempting to promote their policies of disestablishment was negated by the success of the disestablishment and free exercise policies in the United States. When the success of disestablishment became assured, the clergy disqualification clauses lingered in the state constitutions as anomalies, the useful life of which had been spent. Today, Tennessee's clergy disqualification clause alone remains—a historical curiosity which has wandered almost by chance into the twentieth century.

Whatever secondary purpose may have been assumed by the clergy disqualification clauses—for example, the political exclu-

sion of a class of persons, namely ministers, disposed to question slavery—though arguably never legitimate, ceased to have meaning after the Civil War. *But cf.* appellant's counter complaint at par. 9, Juris. Statement A.58.

Perhaps one other historical explanation can be offered for the adoption of clergy disqualification clauses by the states in the early years of the Republic. The unremitting civil strife in England born of the involvement of the Established Church in civil government had produced an important philosophical reaction. One of the most important philosophical influences on political leadership in the United States in the revolutionary period was John Locke. *See* C. BECKER, THE DECLARATION OF INDEPENDENCE 27 (1922). Support for the policy of clergy disqualification can be found in the writings of John Locke. Rigid separation between civil government and religion had been urged by John Locke in 1689:

> I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other. If this be not done, there can be no end put to the controversies that will be always arising between those that have, or at least pretend to have, on the one side, a concernment for the interest of men's souls and, on the other side, a care of the commonwealth. J. LOCKE, 6 WORKS 9 (1823)

Locke's ideal commonwealth was a "society of men constituted only for the procuring, preserving and advancing their own civil interests." *Ibid.* Locke favored limitation of the jurisdiction of the magistrate or public officer to "civil concernments" and denied the civil magistrate any role in the "care of souls." *Id.* at 10. Correspondingly, he argued that the authority of the clergy

> . . . ought to be confined within the bounds of the church, nor can it in any manner be extended to civil affairs; because the church itself is a thing absolutely separate and distinct from the commonwealth. The boundaries on both sides are fixed and unmovable. He jumbles heaven and earth together, the things most remote and opposite, who mixes these societies, which are, in their original, end, business and in everything perfectly distinct, and infinitely different from each other. *Id.* at 21.

He argued that the "magistrate's power extends not to the establishing of any articles of faith, or forms of worship, by the force of his laws," *Id.* at 11-12.

Locke was of the opinion that the "only business of the church" should be "the salvation of souls." *Id.* at 30. Locke, whose views had apparently been attacked as anti-clerical or anti-religious, protested that he was more a friend to the clergy and their calling "than those amongst them who show their forwardness to leave the word of God to serve other employments." *Id.*, at 172. Locke declared that the office of a minister of the Gospel requires "the whole man" and that

> . . . such busy men as cannot be content to be divines without being laymen too, would so little keep up the reputation which ought to distinguish the clergy, or preserve the esteem due a holy, i.e., a separate order; that nobody can show greater good-will to them than by taking all occasions to put a stop to any forwardness to be meddling out of their calling. This, I suppose, made a learned prelate of our church out of kindness to the clergy, mind them of their stipulation and duty in a late treatise and tell them that "the pastoral care is to be a man's entire business, and to possess both his thoughts and his time" *Id.* at 173 [Locke's reference was to the DISCOURSE OF PASTORAL CARE published in 1692 by Gilbert Burnet, Bishop of Salisbury.]

Thomas Jefferson himself could have been induced to support a clergy disqualification policy—a position he later re-

pudiated—in part as a result of the influence of John Locke. The early American clergy disqualification clauses, including that of Tennessee, bear close resemblance to the philosophical position and, indeed, even to the phraseology of John Locke. The important qualification which should be made is that Locke's position, while perhaps a preferred alternative to the intertwined, if not incestuous, relationship between the Established Church and civil government in England in the seventeenth century is but an ill-suited and incongruous transplant twentieth century America. Whatever merit the rigid separation of the civil and ecclesiastical policies into mutually exclusive spheres of influence may have offered as a means of limiting the excesses of the still powerful Established Church in seventeenth century England, it is plain that such a policy has little merit today. The clergy disqualification policy has been rendered superfluous by the success of our country's policy of disestablishment. Equally important, the clergy disqualification clauses were based upon Locke's premise—certainly erroneous today—that clergy are incapable of dividing their ecclesiastical concerns from their secular responsibilities as citizens.

2. **Clergy disqualification for civil offices in the United States other than Tennessee.**

A. Virginia

Precedent for the clergy disqualification clause in the Virginia Constitution of 1776 was established in the colonial law of the commonwealth. At the grand assembly of July 5, 1653, it was ordered that

> . . . Mr. Robert Bracewell, Clarke, be suspended, and is not in a capacitie of serving as a Burgesse, since it is vnpresidentiall, and may produce bad consequences. 1 HENNING'S VA. STATUTES AT LARGE 378 (1823).

The notation appearing in the margin next to the exclusion reads: "Minister of the gospel suspended and declared ineligible to a seat in the house of burgesses" *Ibid.* At least one other minister was excluded after Bracewell. In 1699, Rev. John Waugh was excluded from the Virginia assembly. VA. H. JOUR. 140 (H. McIlwaine ed.)

A possible explanation for the adoption of the clergy disqualification clause by the Virginia constitutional convention of 1776 is contained in house debates on the exclusion of a minister from the Virginia legislature in 1827. A committee of Privileges and Elections presented a report to the House in 1827 which contained the reasons believed by the committee for the adoption of the clergy disqualification clause in 1776.

The report set forth the following explanation:

> It is certain that our civil rights have no dependence on our religious opinions, and it is also certain, that our ancestors knowing this, intended to keep separate Church and State. No mode was calculated more certainly to effect this object, than by denying participation in civil government, to all those, whose high and influential stations gave them opportunity by preaching, of working upon and inflaming the minds of their sects, and bringing with them into councils of the nation, all the prejudices which might be engendered under circumstances of high sectarian feeling in church matters. Should the advocates and orators of two distinct sects obtain possession of our Legislative Hall, the wants of the great body of the people would soon be merged in the agitation of theological subjects and when victory gave the palm to one or the other, "the presumption of such ecclesiastical legislators and rulers, though themselves fallible and uninspired men, would assume dominion over the faith of others, setting up their own opinions and mode of thinking as the only true and infallible; and as such, would

endeavor to impose them on the country. We should be compelled to furnish contributions of money for the propagation of opinions in which we did not believe, and forced to support a teacher of a particular religious persuasion, instead of the comfortable liberty of contributing to a pastor, whose morals we would make our pattern, and whose powers we felt most persuasive to righteousness." VA. H. JOUR., Feb. 2, 1827 (microfilm).

Soon after the adoption of the constitution, the provision excluding the clergy was applied to John Corbley, of Monongalia, in 1777. When the matter was raised in the House, Corbley admitted being a minister of the gospel but claimed that he received no money for performing his function. Nevertheless, he was still excluded. VA. H. JOUR., Nov. 1, 1777.

In 1783, Thomas Jefferson, being dissatisfied with the Virginia Constitution of 1776, prepared a draft of a new Virginia Constitution which contained a clergy disqualification clause. 6 PAPERS OF THOMAS JEFFERSON 297 (J. Boyd ed., 1952). Although no constitution was adopted by Virginia in 1783, Jefferson's clergy disqualification clause evoked opposition from James Madison. In 1788, Madison wrote "Remarks on Mr. Jefferson's Draught of a Constitution," which contained the following passage:

> Does not the exclusion of Ministers of the Gospel as such violate the Fundamental principle of liberty by punishing a religious profession with the privation of a civil right? does it not violate another article of the plan itself which exempts religion the cognizance of civil power: does it not violate impartiality by shutting the door against the Ministers of one religion and leaving it open for those of every other. 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON (1865).

By 1800, Jefferson had reversed his position concerning the clergy disqualification clause. In a letter to Jerimiah Moor,

Jefferson recounted the reasons for his earlier view and why he changed:

> In the scheme of the constitution of Virginia which I prepared in 1783, I observe an abridgement of the right of being elected which after 17 years more experience and reflection, I do not approve. It is the incapacitation of clergymen from being elected. The clergy, by getting themselves established by law, and ingrafted into the machine of government, have been a very formidable engine against the civil and religious rights of man. They are still so in many countries, and even in some of the U.S. Even in 1783 we doubted the stability of our recent measure for reducing them to the footing of other useful callings. It now appears that our means were effectual. The clergy here seem to have relinquished all pretensions to privilege, and to stand on a footing with lawyers, physicians, etc. They ought, therefore, to possess the same right. 9 WORKS OF JEFFERSON 143 (P. FORD ed., 1905)

The controversy which arose in 1827 concerning the eligibility of Mr. Humphrey Billups to serve in the legislature ended in his exclusion. Mr. Billups asserted that since he was only a deacon in the Methodist Church and was not authroized to "dispense the word, the Sacraments, and other Holy Orders," VA. H. JOUR., Feb. 2, 1827 (microfilm), he was not a minister within the meaning of the clause; and therefore, he should not be excluded from the legislature. Mr. Billups' argument failed, and the House affirmed the Committee of Privileges and Election resolution that "Humphrey Billups, a Delegate returned from the county of Mathews, is a Minister of the Gospel within the true spirit and intent of the 14th Article of the Constitution, and therefore not entitled to a seat in the present House of Delegates." *Ibid.*

The reasons argued for omitting the clergy disqualification clause at the 1867-68 Virginia Constitutional Convention cen-

tered on the moral character of clergymen and the legislature. According to one of the delegates of the convention:

> You cannot degrade such men [clergymen] by engaging them in the conduct of your affairs, nor can you drag them down into the filth of politics. On the contrary, if listened to and respected, they will lift you and all of us out of that filth, and dignify and ennoble every branch of business which may be entrusted to their care, to their guidance and direction. Nothing has more tended to our degradation in morals than the practice, in this state of excluding good men from office, to give place for drunkards and libertines. JOUR. OF VA. CONST. CONV., Jan. 16, 1868 (remarks of Mr. President) (microfilm).

The Virginia Constitutional Convention of 1867-1868 omitted the clergy disqualification clause, and it has not been readopted in any subsequent Virginia constitutions.

B. KENTUCKY

Two plausible explanations can be given for the adoption of the clergy disqualification clause in the 1792 Kentucky constitution: (1) exclusion of a class of persons, namely ministers, unfavorably disposed to slavery and (2) imitation of the English model.

The 1792 constitutional convention of Kentucky was a hotbed of controversy centered on the issue of slavery. Six members of the convention were ministers of the gospel—Rev. George Smith, Rev. James Crawford, Rev. John Bailey, Rev. Benedict Swope, Rev. James Garrad and Rev. Charles Kavanaugh. JOUR. OF KY. CONST. 10 (1792) (microfilm). On April 18, 1792, the ministers attempted unsuccessfully to expunge the slavery article from the constitution. *Ibid.* On the same day, a provision

prohibiting members of congress from serving in the state legislature was amended to disqualify ministers of religious societies. *Ibid.*

Based on these facts, it is plausible that the clergy disqualification clause was adopted for the purpose of excluding a class of persons, namely ministers, who might be inclined to question the South's peculiar institution—slavery. Oddly enough, all the ministers voted for the provision to exclude themselves. B. YOUNG, CONSTITUTIONS OF KENTUCKY AND THEIR HISTORY 36-37 (1890). It is suggested that the ministers "considered it a mark of deference that . . . a really righteous man was too good to be a member of even an average legislature." G. Willi "History of Kentucky Constitutions and Constitutional Conventions" 28 KY. HIST. SOC. REG. 315 (1930).

According to one of the delegates to the Kentucky Convention of 1890 which deleted the clergy disqualification clause from the Kentucky Constitution, the original clause was attributable to imitation of the English model:

> [W]e had only been separated from Great Britain a short time and the attachment for the institutions of that country remained with our forefathers who modeled our institutions after theirs, so far as they were applicable to a republic. When they examined the law with reference to the House of Commons, it was found to exclude clergymen, hence they concluded to follow that precedent and exclude them from the legislature. JOUR. OF KY. CONST. 3849 (Feb. 19, 1890) (remarks of Mr. Kennedy) (microfilm).

See N.S. Shaler, KENTUCKY: A PIONEER COMMONWEALTH 122 (1888).

According to another delegate of the Kentucky Convention of 1890, the clergy disqualification clause was readopted in 1850

because "[i]t was well known that the most prominent ministers of the state of Kentucky were for emancipation and hence that led to the Convention of '49 to exclude ministers from holding offices." JOUR. OF KY. CONST. 3855 (Feb. 19, 1890) (microfilm) (remarks of Mr. Petrie).

The opponents of the clergy disqualification clause set forth several arguments for the clause's repeal: (1) the British model of excluding clergy from the House of Commons was not for the purpose of "separating Church and state, . . . but because, under the law of England, he [the clergyman] was considered already as holding an office, being a member of one of the ecclesiastical courts of the kingdom." *Id.* at 3849 (remarks of Mr. Kennedy) Also, bishops were *ex officio* members of the House of Lords *Id.* at 3853 (remarks of Mr. Farmer); (2) Unlike the powerful Church of England, the clergy in this country are divided into various denominations and "whatever our theories may be, that the danger is a nullity, and does not exist that any church will gain the preponderance in this country." *Ibid* (remarks of Mr. Farmer); (3) Whenever a man is denied the right to hold public office "we place a ban and inflict a punishment upon him, which according to the policy of our government should only be inflicted upon the vilest criminal." *Id.* at 3850 (remarks of Mr. Kennedy).

In response to these arguments, the proponents of the clergy disqualification clause asserted: (1) that their opponents' arguments "would be just as good in favor of woman suffrage as it would for allowing the priest and preachers to hold a seat in the legislature." *Ibid.* (remarks of Mr. Strauss); (2) Ministers would make unwise legislators because "the very nature of their profession, of their reading and education, and all their associations unfit them as a class to engage in the making of laws." *Ibid.* (remarks of Mr. Strauss); and (3) if ministers are allowed to sit in the legislature, "you break down that separation, which

all writers upon the subject of free government content is absolutely necessary both for religious and civil liberty." *Id.* at 3851 (remarks of Mr. Strauss).

C. South Carolina

The 1778 South Carolina Constitutional convention adopted a clergy disqualification clause, apparently because of the hostility between the Presbyterians and the Episcopalians, the established church in South Carolina. A speech by the Presbyterian minister, William Tennant, who was opposed to the establishment of the Episcopal Church, is credited with swaying the assembly in favor of disestablishment in 1778. D. WALLACE, II THE HISTORY OF SOUTH CAROLINA 169 (1934).

A contemporary source attributes the South Carolina clergy disqualification clause in large part to Episcopal reaction to Tennant and his disestablishment victory. The diary of Timothy Ford relates:

> I am told that it [the clergy disqualification clause] got a place in the constitution chiefly to exclude one parson Tennant (a presbyterian) and who opposed with great eloquence and finally with success the attempts that were made to establish hierarchy and fix the episcopalians as the only Legal and Supreme Church in this country. "Diary of Timothy Ford." [1785], 13 S.C. HIST. AND GEN. MAG. 197 (1912).

D. Maryland

According to a delegate at the 1864 Maryland Constitutional Convention, the probable reason for the adoption of the clergy disqualification clause by the 1776 Maryland Constitutional Convention was that church and state should be separated, and

the clergy disqualification clause was one of the measures for this purpose. JOUR. OF MD. CONST. CONV. 792 (July 9, 1864) (remarks of Mr. Chambers) (microfilm).

E. North Carolina

In the North Carolina Constitution of 1776, the adoption of the clergy disqualification clause was anomalous since Dr. David Caldwell, a clergyman, was a "member of the Congress which framed the constitution and other clergymen did much for the Revolutionary cause." W. BOYD, A HISTORY OF NORTH CAROLINA 145 (1919). Another authority states that the clergy disqualification clause was "copied with slight changes . . . from the constitution of Delaware, which had been adopted September 21, 1776 . . ." E. Ketcham, "The Sources of the North Carolina Constitution of 1176," 6 N.C. HIST. REV. 229 (1929). At least three clergymen have been excluded from the North Carolina legislature. In 1801 John Culpepper and William Taylor were excluded from the state senate, while Josiah Crudup was excluded from the state senate in 1820. F. GREEN, CONSTITUTIONAL DEVELOPMENT OF THE SOUTH ATLANTIC STATES: 1776-1860, at 183 (1966).

F. Georgia

In Georgia, the clergy disqualification clause in the 1776 Georgia Constitution may have been directed at Reverend John Zubly, who had left the Continental Congress to change sides and become a loyalist. E. WARE, CONSTITUTIONAL HISTORY OF GEORGIA 37 (1947). John Witherspoon, President of Princeton,

> . . . who had been a forceful member of the Continental Congress, and himself a Presbyterian minister . . . did not like the idea for excluding clergymen as such from public office. When the matter was being vigorously discussed because to this effect taken by the state of Georgia, he wrote a protest to one of the financial papers of the state. A. STOKES, 1 CHURCH AND STATE IN THE UNITED STATES 624 (1950).

In his letter, which is reprinted *id.* at 624-25, Witherspoon argues forcefully against Georgia's clergy disqualification clause. His eloquent arguments have lost none of their persuasiveness:

> . . . Now suffer me to ask this question: Before any man among us was ordained a minister, was he not a citizen of the United States, and if being in Georgia, a citizen of the state of Georgia? Had he not then a right to be elected a member of the assembly, if qualified in point of property? How then has he lost, or why is he deprived of this right? Is it by offence or disqualification? Is it a sin against the public to become a minister? Does it merit that the person who is guilty of it should be immediately deprived of one of his most important rights as a citizen? Is not this inflicting a penalty which always supposes an offence? Is a minister then disqualified for the office of a senator or representative? Does this calling and profession render him stupid or ignorant? I am inclined to form a very high opinion of the natural understanding of the freeman and freeholders of the state of Georgia, as well as of their improvement and culture by education, and yet I am not able to conceive, but that some of those equally qualified, may enter into the clerical order: and then it must not be unfitness, but some other reason that produces the exclusion. Perhaps it may be thought that they are excluded from civil authority, that they may be more fully and constantly employed in their spiritual functions. If this had been the ground of it, how much more properly would it have appeared, as an order of an ecclesiastical body with respect to their own members. In that case I

should not only have forgiven but approved and justified it; but in the way in which it now stands, it is evidently a punishment by loss of privilege, inflicted on those who go into the office of the ministry; for which, perhaps, the gentlemen of Georgia may have good reasons, though I have not been able to discover them. Id. at 624-25.

Witherspoon's attacks on the Georgia clergy disqualification clause provide additional support for appellant's vagueness claim. *See* Juris. Statement at 27-28. Witherspoon reasoned:

> But besides the uncertainty of the principle on which this resolution is founded, there seems to me much uncertainty as to the meaning of it. How are we to determine who is or is not a clergyman? Is he only a clergyman who has received ordination from those who have derived the right by an uninterrupted succession from the apostles? Or is he also a clergyman, who is set apart by the imposition of hands of a body of other clergyman, who has exhorted in a methodist society, or spoken in a quaker meeting, or any other religious assembly met for public worship? There are still greater difficulties behind:—Is the clerical character indelible? There are some who have been ordained who occasionally perform some clerical functions, but have no pastoral charge at all. There are some who finding public speaking injurious to health, or from other reasons easily conceived, have resigned their pastoral charge, and wholly discontinued all acts and exercises of that kind; and there are some, particularly in New England, who having exercised the clerical office some time, and finding it less suitable to their talents than they apprehended, have voluntarily relinquished it, and taken to some other profession, as law, physic, or merchandize—Do there all continue clergymen, or do they cease to be clergymen, and by that cessation return to, or recover the honourable privileges of laymen? A. STOKES, 1 CHURCH AND STATE IN THE UNITED STATES 625 (1950).

G. New York

The adoption of the clergy disqualification clause in the 1777 New York constitution according to one authority was one of several measures to obtain separation of church and state in New York.

> When the Convention began the consideration of a plan or frame of government for the new state, the established church was one of the institutions of the colony. It formed a most important part of the colonial Constitution, and, because of the union of church and state then existing, the church was as much under the fostering care of the government as any other department of colonial affairs. The governor had power to appoint ministers to local churches, and he was directed to procure the removal of any minister who might give scandal by his doctrine or manners . . . [A]n examination of the legislative records shows that ecclesiastical affairs frequently engaged the attention of the colonial legislature. The first constitutional convention determined on a separation of church and state, not only by adopting the policy of universal religious toleration, but also by adopting a provision excluding ministers from the right to hold civil offices, and (article 35) by expressly abrogating and rejecting all parts of the common law or statutes which "may be construed to establish and maintain any particular denomination of Christians or their ministers. C. LINCOLN, 1 THE CONSTITUTIONAL HISTORY OF NEW YORK 543 (1906).

The clergy disqualification provision was readopted in the 1821 New York constitution; however, delegates at the 1846 New York constitutional convention argued that the exclusion of clergymen from the legislature was an "odious distinction," and the provision was discontinued. C. LINCOLN, 2 THE CONSTITUTIONAL HISTORY OF NEW YORK 111 (1906).

3. **Disqualification of clergy for civil office in Tennessee.**

A prominent constitutional historian of Tennessee has observed that

> . . . The institutions of Tennessee are of purely English origin. There is nothing in Tennessee, considered as a political organization, which is not traceable directly to England. J. CALDWELL, STUDIES IN THE CONSTITUTIONAL HISTORY OF TENNESSEE 79 (1895)

The influence of English law on the institutions of Tennessee is likewise apparent from Tennessee's reception of the common law through North Carolina. *See* N.C. ACTS, c. 5, sec. 2 (1778) and *Moss v. State*, 131 Tenn. 94, 173 S.W. 859 (1915). The influence of English practice on the Tennessee Constitutional Convention of 1796 was manifest:

> The first two of the fourteen rules of order adopted by the convention allowed the members to sit in their places with their heads covered when the President was in the chair, affording a curious illustration of the survival of the habit of the British Parliament, originally intended, I suppose, to assert, in a somewhat aggressive and unnecessary form, the dignity of its members. E. Sanford, "The Constitutional Convention of 1796," 1896 BAR ASSOC. OF TENN. 92, at 106 (hereinafter cited 1896 TENN. BAR PROCEEDINGS).

It has been observed that

> . . . the Constitution of 1796 was not in any sense a new creation, but was the result of logical and gradual growth, and, in fact, but the adaptation and modification, to suit changed conditions, of constitutional principles with which the members of the convention had long been familiar. . . .

> It was but natural then, that, in casting about for material, they should have seized that which lay closest at hand: the Constitution which had been adopted by North Carolina in the year 1776. . . .
>
> It was a Constitution under which they themselves had lived for the intervening fourteen years between 1776 and the creation of the Territorial Government in 1790. . . . *Id.* at 108-09.

Unfortunately, the debates of the Convention

> . . . are not given in the Journal. They are not to be found elsewhere. Accounts, therefore, of its more minute transactions are meagre. . . . J. RAMSAY, THE ANNALS OF TENNESSEE 652 (1853)

The only extant legislative history of the clergy disqualification clause of the Tennessee Constitution of 1796 is from the journal and is, indeed, meagre. A draft of a proposed Constitution was presented to the Convention at Knoxville on January 30, 1796 which included the following:

ARTICLE VIII

> SEC. 1. Whereas the ministers of the gospel are, by their professions, dedicated to God and the cure of souls, and ought not to be diverted from the great duties of their functions; therefore no minister of the gospel, or priest of any denomination whatever, shall under any pretence or description be eligible to, or capable of holding any civil or military office or place of trust within this state.
>
> SEC. 2. No man belonging to any sect or denomination of religion, the tenets of which are known to be opposed to the bearing of arms, shall be liable to be fined for non attendance at general or private musters. JOUR. OF TENN. CONST. CONV. OF 1796 at 18 (1852)

On February 2, 1796, the convention amended the proposed clergy disqualification clause as follows:

> Mr. Carter moved, and was seconded by Mr. Jackson, that the words at any time hereafter, under any pretence or description whatever be eligible to, or capable of holding any civil or military office, or place of trust within the state,' in the first section of the eighth article, be struck out, for the purpose of inserting the following; 'be eligible to a seat in either branch of the legislature, which carried in the affirmative. *Id.* at 23.

The Tennessee clergy disqualification clause, as amended, was approved by the unlimited "Constitutional Conventions of 1835 and 1870 . . . and ratified by a vote of the people of Tennessee." *Paty v. McDaniel*, 547 S.W. 2d 897 at 902 (1977). For the effect of ratification by a vote of the people of Tennessee on the validity of Tennessee's clergy disqualification clause *cf. Reitman v. Mulkey*, 387 U.S. 369 (1967). Tennessee's clergy disqualification clause remains in force today, subject to the stay granted appellant by Mr. Justice Stewart on July 6, 1977 and the Court's disposition of this case.

The amendment of February 2, 1976 limiting the applicability of the clergy disqualification clause to eligibility for a seat in either branch of the legislature had the effect of conforming Tennessee clergy disqualification policy to the practice prevailing under the English common law. Imitation of the English model or the clergy disqualification clauses in the constitutions of other states is one plausible explanation of Tennessee's clergy disqualification clause. It has been authoritatively suggested that the "same cautious adherence to English precedents in state-making was naturally exhibited [in Tennessee at the 1796 convention as] everywhere in America." J. CALDWELL, STUDIES IN THE CONSTITUTIONAL HISTORY OF TENNESSEE 90 (1895). Imitation of the English model may afford a satisfactory explanation—it does not afford a sufficient reason. If imitation of the English model be the true explanation of Tennessee's clergy disqualification clause, one is compelled to accept the conclusion of Joshua Caldwell that

> . . . the people [of Tennessee in 1796] were thoroughly democratic in sentiment, but they had not the experience or the confidence to assert themselves." *Ibid.*

The legislative history of the convention of 1796, limited though it is, does permit several inferences relevant to establishing legislative purpose. First, the convention itself was less apprehensive of the danger of clerical participation in civil society—less "anti-clerical", if you will—than the drafting committee. This is apparent in that the drafting committee was willing to exclude the clergy from the exercise of any temporal authority. *Accord*, 6 CHARLES I, c. 27 (1641). *See also* J. LOCKE, 6 WORKS 21 [1689] (1823). The 1796 convention was content to adopt the practice of the English common law subsequent to 13 CHARLES II c. 2 (1661). Second, the convention was less tolerant of the free exercise of religion than was the drafting committee. This can clearly be seen in the deletion of section 2 of Article VIII as proposed in the draft January 30, 1796, and its replacement by the following clause which, like the clergy disqualification clause, remains in force in the present Tennessee constitution:

> No atheist shall hold a civil office—no person who denies the being of God, or a future state of rewards and punishments shall hold any office in the civil department of this State.

But see Torcaso v. Watkins, 367 U.S. 488 (1961). Interestingly, Caldwell has interpreted the disqualification of atheists from civil office in Tennessee as a "tacit permission to unbelievers to take the lead in the military service." J. CALDWELL, STUDIES IN THE CONSTITUTIONAL HISTORY OF TENNESSEE 95 (1895).

The placement of clauses disqualifying clergy from legislative office and atheists from any civil office plainly suggest that the intent of the convention of 1796 was to fence out certain portions of the electorate from full participation in civil government because of their religious views or conduct. One of the most important functions of the equal protection clause today is to prohibit the states from making such invidious classifications which impinge upon the fundamental voting rights of our citizens. Plainly, the 1796 convention intended to penalize both ministers and atheists for their free exercise of religion. The exclusion of both extremes of the religious spectrum —clergy and atheists—has the effect of establishing a state imposed religious orthodoxy inconsistent with the Establishment Clause of the First Amendment. The state of Tennessee has sought to encourage "safe-thinking" views in matters of religion through the sanction of deprivations of the nonconforming citizens' fundamental rights of free exercise, speech, association and voting.

The argument that the clergy disqualification clause of 1796 is an establishment of religion incompatible with the First Amendment is compelling. To be sure, the Scotch-Irish Presbyterians who convened in Knoxville in 1796 were by no means interested in establishing the Church of England. But their limited peripheral vision in matters of religion can be seen both in Rev. Houston's draft of the "Frankland" constitution and in the 1796 convention's exclusion of atheists from civil office. Even Rev. Houston's draft excluded the clergy from legislative office. The exclusion of clergy from civil affairs was an article of faith for the Presbyterian followers of Calvin and Knox at the 1796 Tennessee Convention just as it had been for the bishops of the Established Church of England. In his "Brief Exhortation to England for the Speedy Embracing of the Gospel" in 1558 John Knox cited the twentieth chapter of *Matthew* in admonishing that "Ministers of the Word ought not to exercise any civil

office, or to be intangled with the affaires of the Realme." 5 WORKS OF JOHN KNOX 519 (D. Laing, ed. 1966). Knox declared:

> Let none that be appointed to labour in Christes vineyearde be entangled with Civil Affaires, (and, as ye call them, the affaires of the Realme,) except it be when the civil magistrate and ministers of the Worde assemble together, for execution of discipline, which is a thing easie to be done, without withdrawing any person from his charge, if that which is before expressed be observed. For, as touching their yearly commynge to the Parliament, for matters of religion, it shall be superfluous and vaine; if God's true religion be so once established, that after it be never called in controversie. *Ibid.*

The Tennessee clergy disqualification clause also violates the Establishment Clause because it gives a sectarian preference to those religions the beliefs or ecclesiastical regulations of which exclude clergy from civil office. The clause likewise imposes a sectarian penalty upon religious groups such as appellant's which are neutral as to clergy candidacy for civil office.

More than eighty years ago a distinguished member of the Tennessee bar argued that the political exclusion of clergy and atheists conflict with the guarantees of section four of the Tennessee Constitution's Declaration of Rights respecting the free exercise of religion and prohibiting the use of religious tests as a qualification to any office or public trust under the state of Tennessee. *See* J. CALDWELL, STUDIES IN THE CONSTITUTIONAL HISTORY OF TENNESSEE 94 (1895).

The Tennessee Supreme Court, citing Joshua Caldwell as an authority, conceded that Tennessee's clergy disqualification clause was "almost totally derived from the 1776 North Carolina Constitution and the 1784 Constitution of the lost state of

Franklin."[16] *Paty v. McDaniel*, 457 S.W. 2d 987, at 907 (1977). One really need look no further than the fine 1895 work of Joshua Caldwell, whose less scholarly 1907 edition directed to the Tennessee history high school textbook market, was cited by the Tennessee Supreme Court, *ibid.*, to respond effectively to Tennessee court's holding:

> On the subject of religious liberty, it may be added that the Constitution of North Carolina, which was adopted by Franklin, with a few amendments, has in its thirty-second section the following words: "That no person who shall deny the being of God, or the *truth of the Protestant religion*, or the divine authority of either the Old or New Testaments, or who shall hold religious principles incompatible with the freedom and safety of the State, shall be capable of holding any office or place of trust or profit in the civil department within this State." This was the law of our territory so long as it remained a part of North Carolina. And unless the provision was omitted from the Constitution as recast by Franklin, there certainly was a deliberate and most unjust limitation of religious liberty on the soil of Tennessee and by a law made by its own people. It is improbable that this section was omitted. A more stringent requirement was proposed in the Houston Constitution, and the Carolina provision is in accord with the temper of the religious leaders of Franklin. J. CALDWELL, STUDIES IN THE CONSTITUTIONAL HISTORY OF TENNESSEE 96 (1895) (emphasis in original).

Section 32 of the Franklin Constitution to which Caldwell referred followed immediately the clergy disqualification clause

[16] The "lost State of Franklin" refers roughly to the territory in the eastern portion of Tennessee between 1784, when its settlers declared their independence from North Carolina, and 1790, when this area was included in the Territory of Tennessee. *See* J. RAMSEY, ANNALS OF TENNESSEE 282-336 (1853).

with which it must have been so closely associated at the Jonesboro convention of 1784. The clergy disqualification clause in the Jonesboro Constitution, in substance and style, was patterned upon the North Carolina constitution of 1776:

> Sec. 31st. That no Clergyman or preacher of the gospell of any denomination shall be capable of being a Member of either the Senate or house of commons while he continues in the service of the pastoral function. FRANKLIN CONST. of 1784, 9 AM. HIST. MAG. 406 (1904).

The Tennessee court concluded: "If any burden can be said to be imposed upon the exercise of religion, it is indirect, miniscule, and does not make unlawful any religious practice." *Paty v. McDaniel*, 457 S.W. 2d 987 at 905 (1977). An appropriate response to this line of reasoning was given by Joshua Caldwell, in his comments on the Franklin Constitution declared:

> It will be observed that freedom of opinion was not restricted, directly. One was at liberty to believe anything, but only the Protestants had the right of civil preferment. It can not be maintained that there was religious liberty where such a law prevailed, and there can be but little doubt that it prevailed in Franklin. *Id.* at 95-96.

Caldwell's conclusion that the Constitution of 1796 "did establish unlimited liberty," whether made for reasons of tact or respect for the framers, then long dead, was based upon two premises: first, that he "could not recall any suggestion, even, of the exclusion of a citizen from office on account of his religious opinions;" and, second, that the constitution of 1796 although it "did not go so far as the very advanced religious or irreligious thought of the present time demands may be true; but . . . [c]onsidered with reference to the conditions of the time, it was exceptionally liberal . . ." *Ibid.* Although the present Tennessee constitution does not adopt the Franklin constitution's

civil preferment for Protestants, the civil preferment it gives to non-clergy and non-atheists strike equally at the heart of the fundamental rights of voting, political candidacy and free exercise of religion.

Just as Caldwell attacked the Tennessee clergy disqualification clause for its inconsistency with the religious test clause of section four in the Tennessee Constitution's Declaration of Rights, *id* at 95-96, appellant has urged the invalidity of Tennessee's clergy disqualification clause upon the force of the religious test clause of U.S. Const. art. VI, cl. 3. *See* Juris. Statement at 28-30.

In contrast to the harmony of the 1796 convention, the adoption of the Franklin constitution was marked by bitter conflict. The events of the controversial Franklin conventions must have been fresh in the minds of the delegates to the 1796 convention.

The controversy over the adoption of the Franklin constitution centered to a considerable extent on the qualifications for members of the legislature. Rev. Sam Houston proposed a constitution for "Frankland", the House of Representatives of which

> . . . [sec. 2] shall consist of persons most noted for wisdom and virtue. . . .
>
> . . . [sec. 3] And no person shall be eligible or capable to serve in this or any other office in the civil department of this State, who is of an immoral character, or guilty of such flagrant enormities as drunkenness, gaming, profane swearing, lewdness, sabbath breaking and such like or who will, either in word or writing, deny any of the following propositions, *viz.*:
>
> 1st. That there is one living and true God, the Creator and Governor of the universe.

> 2d. That there is a future state of rewards and punishments.
>
> 3d. That the scripture of the Old and New Testaments are given by divine inspiration.
>
> 4th. That there are three divine persons in the Godhead, co-equal and co-essential.
>
> And no person shall be a member of the House of Representatives who holds a lucrative office either under this or other States . . . or minister of the gospel, or attorney at law, or doctor of physic. J. RAMSEY, ANNALS OF TENNESSEE 326-27 (1853).

See also E. Sanford "The Constitutional Convention of 1796". 1896 PROCEEDINGS OF TENN. BAR ASSOC. 109-10.

Ramsay describes the events that followed upon the introduction of the Rev. Houston's proposed constitution for Franklin:

> . . . . new elements of strife had arisen during the session of the convention, and new topics of discussion had been thrown out amongst the people. The dissentients comprised in their number, much of the wisdom and virtue of the body to which they belonged; and desirous of sustaining themselves with their constituents, they published an account of their proceedings, together with the rejected form of government, and appealed again to the people. Here, as might have been anticipated, sectarian bigotry, unlettered ignorance, and impassioned ultraism, would all tend to aggravate the existing discord and embitter the dispute. [Some sections, including the sections relating to qualifications for members of the House of Representatives] . . . became prolific sources of controversy and angry debate. The deputies in convention had dissented; their constituents themselves could not harmonize; and without any further effort to remodel the govern-

> ment, the people at length acquiesced in the constitution of the mother state. J. RAMSEY, ANNALS OF TENNESSEE 336 (1853).

An explanation of the religion clauses in the 1796 constitution and of the bitter religious disputes generated by the adoption of the Franklin constitution in the context of the predominant religious values of the Tennessee frontier at the close of the eighteenth century can be found in J. Henneman, "Recent Tennessee History by Tenresseans" 4 SEWANEE REV. 439, at 448-58 (1896).

The argument for excluding appellant from the 1977 limited constitutional convention of Tennessee is even more difficult to sustain than the argument for excluding clergy from the legislature. State constitutional conventions are the people assembled to establish the rules by which civil society shall be governed. Only if the clergy were not subject to the governance of or otherwise affected by civil society could their exclusion from a constitutional convention be ethically justified. It will be observed that ministers participated as convention delegates in many of the conventions which adopted constitutions excluding ministers from certain civil offices. The arguments of John Locke that the clergy are beyond the pale of civil society are no more suited to our situation than were

> . . . the famous and impossible "Fundamental Constitutions" which were conceived by the great empirical philosopher, John Locke, and which formulated probably the worst scheme of government that ever was committed to writing. J. CALDWELL, STUDIES IN THE CONSTITUTIONAL HISTORY OF TENNESSEE 76 (1896).

CONCLUSION

Counsel respectfully requests that the decree and opinion of the Tennessee Supreme Court be reversed and this case be remanded with direction that judgment be entered for appellant and that appellant be awarded costs, including reasonable attorney fees. The Tennessee clergy disqualification clause considered in the historical context of the English common law and the similar provisions in the law of other states amounts to an establishment of religion. The clause cannot be justified, as the Attorney General of Tennessee argues, upon the secular state interest in the maintenance of separation of church and state. Such a rigid state doctrine of separation impermissably deprives appellant of his fundamental civil rights to vote and be a candidate for public office secured by the Equal Protection Clause of the Fourteenth Amendment for exercising his fundamental right of free exercise of religion. Authority relied upon by the Attorney General to support the power of the state to regulate religious *action* as opposed to *belief* falls short of the mark because the religious *action* here, like the religious *action* in *Barnette* and *Yoder*, is protected. Moreover, countervailing social interests in health and safety are not implicated here, as they were in *Reynolds*, *Prince* and *Pack*. For these reasons, appellant urges that he be awarded judgment, including costs and reasonable attorney fees.

Respectfully submitted,

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Supreme Court, U. S.
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76-1427

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. A-12 (76-1427)

REV. PAUL A. McDANIEL,
Appellant,

v.

SELMA CASH PATY, a Resident of Hamilton County, Tennessee; SHIRLEY HASSLER, as Coordinator of Elections of the State of Tennessee; LYTEL LANDERS, as Chairman of the State Election Commission of Tennessee; RAY BLANTON, as Governor of the State of Tennessee; BROOKS McLEMORE, as Attorney General of the State of Tennessee; JOE C. CARR, as Secretary of State of Tennessee; JAMES HARPSTER, TOMMY POWELL, RICHARD HOLCOMB, JACK SEATON, as Members of the State Election Commission of Tennessee; CHARLES HINSON, Chairman of the Hamilton County Election Commission; CLAUDE CLARK, TOMMIE CARTER, JAMES PENLEY, ALBERT W. SECOR, as Members of the Hamilton County Election Commission; TOM MOORE, JR., as Registrar-at-Large for the Hamilton County Election Commission,
Appellees.

On Appeal from the Supreme Court of Tennessee

BRIEF FOR THE APPELLEES

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IN THE

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Appellees.

On Appeal from the Supreme Court of Tennessee

BRIEF FOR THE APPELLEES

OPINION BELOW

The opinion of the Supreme Court of Tennessee was entered on March 7, 1977, and is reported in 547 S.W.2d 897.

JURISDICTION

The opinion of the Supreme Court of Tennessee, sitting at Knoxville, was entered on March 7, 1977. An order in accordance with the Supreme Court's opinion was entered on March

7, 1977, in the Clerk's Office at Knoxville. A notice of intent to appeal was filed with the Clerk on March 16, 1977. An application for a stay of execution was filed with the Clerk on March 28, 1977, and an Order granting a stay of execution for ninety (90) days pending an appeal to this Court was entered on April 21, 1977. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257(2) in that the Supreme Court of Tennessee has upheld the validity of a provision of the Constitution of Tennessee that is alleged to be repugnant to the Constitution of the United States.

QUESTIONS PRESENTED

The questions involved in this case are:

I

Is the Call for the Constitutional Convention, Chapter 848, Public Acts of 1976, Including § 4, and the Constitution of Tennessee, Article IX, § 1, Consistent With the Free Exercise of Religion Clause of the First and Fourteenth Amendments of the Constitution of the United States?

II

Is the Call for the Constitutional Convention, Chapter 848, Public Acts of 1976, Including § 4, and the Constitution of Tennessee, Article IX, § 1, Consistent With the Establishment Clause of the First and the Fourteenth Amendments of the Constitution of the United States?

III

Is the Call for the Constitutional Convention, Chapter 848, Public Acts of 1976, Including § 4, and the Constitution of Tennessee, Article IX, § 1, Consistent With the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States?

IV

Is the Call for the Constitutional Convention, Chapter 848, Public Acts of 1976, Including § 4, and the Constitution of Tennessee, Article IX, § 1, Unconstitutionally Vague?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States

The First Amendment to the Constitution of the United States provides for the free exercise of religion.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 for equal protection of the laws.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of Tennessee

Article II, § 9 of the Constitution of Tennessee provides for the qualifications of members of the Tennessee House of Representatives.

"No person shall be a Representative unless he shall be a citizen of the United States, of the age of twenty-one years, and shall have been a citizen of this State for three years, and a resident in the county he represents one year, immediately preceding the election."

Article IX, § 1 of the Constitution of Tennessee provides for the disqualification of ministers from serving in the Tennessee General Assembly.

"Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no Ministers of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature."

STATUTORY PROVISIONS INVOLVED

Chapter 848 of the Public Acts of 1976 of Tennessee, provides for a Limited Constitutional Convention to convene at Nashville on August 1, 1977. Section 4 of the Act provides for the selection and qualifications of the delegates to the Convention:

"Any citizen of the state who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for delegate to the convention upon filing with the County Election Commission of his county a nominating petition containing not less than twenty-five (25) names of legally qualified voters of his or her representative district. Each district must be represented by a qualified voter of that district. In the case of a candidate from a representative district comprising more than one county, only one qualifying petition need be filed by the candidate, and that in his home county, with a

certified copy thereof filed with the Election Commission of the other counties of his representative district.

"Every person desiring to become a delegate to the convention shall qualify by the filing of qualifying petition or petitions by 12:00 o'clock noon, prevailing time, on Wednesday, September 15, 1976. The names of candidates for the delegates to the convention shall be placed on the official ballot in the same manner as candidates for the General Assembly.

"The returns from the various counties of the state electing delegates to the convention shall be certified to the Secretary of State and canvassed by him and the Governor and the Attorney General in the same manner and form as the returns are required to be certified from the election in which the people vote for and against the calling of the convention, as provided in Section 1, and the Governor shall by proclamation announce the names of those elected as delegates to the convention. Delegates to the convention elected and certified shall receive a certificate of election signed by the Governor and attested by the Secretary of State under the Great Seal of the state."

STATEMENT OF THE CASE

This case is before the Court on appeal for a determination as to whether a minister or priest is qualified to hold a public office having the requirement that he be able to qualify as a member of the House of Representatives of the General Assembly, including the limitations contained in Article IX, Section 1 of the Constitution of Tennessee.

Pursuant to the provisions of Chapter 848, Public Acts of 1976, after the voters in Tennessee approved a call for a Constitutional Convention to be held in 1977, in the August 5, 1976 General Election, the appellant, the Rev. Paul McDaniel, the

appellee, Selma Cash Paty, and two other persons filed qualifying petitions for the office of Delegate to the Convention, and their names appeared on the ballot to represent the 29th House District, a part of Hamilton County, Tennessee.* Alleging that the Rev. McDaniel is a Minister of God, serving as pastor of a Baptist Church at the time and that if he should be elected to serve, he could not constitutionally be seated, and the 29th District would be without an elected delegate, the appellee Paty filed a complaint for a Declaratory Judgment, for a determination that the appellant McDaniel is disqualified from holding the office that he sought by reason of Article IX, Section 1 of the Constitution of Tennessee, in that he is a minister, and sought an injunction restraining the Hamilton County Election Commission from placing his name on the ballot. The appellant McDaniel, in his answer, alleged that he was a qualified candidate for election to the Constitutional Convention referred to in the Complaint, that he is not disqualified as alleged in the Complaint, and that the constitutional limitation in Article IX, Section 1, of the Constitution of Tennessee violates and is repugnant to the provisions of the First and Fourteenth Amendments of the Constitution of the United States and, therefore, cannot control.

After considering the limited testimony presented at a hearing and a Motion to Dismiss the complaint filed by the appellant McDaniel, the Court found that the appellant McDaniel is a minister of the gospel within the meaning of qualifications for delegates to the Convention, and that the qualificational requirements of Section 4, Chapter 848, Public Acts of 1976 are unconstitutional under the Constitution of the United States.

After the Chancellor granted an immediate appeal to the Supreme Court of Tennessee, the appellee Paty appealed to the Supreme Court sitting at Nashville. After a remand back to the Chancery Court because the Attorney General was not made

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* The certified count of the votes for Delegate in the 29th House District shows that the Rev. McDaniel received more votes than the other three candidates.

a party to the suit, or given notice of the challenge to the constitutional provisions of Article IX § 1 of the Constitution of Tennessee, the Chancellor reaffirmed his prior determination that the part of Chapter 848, § 4, Public Acts of 1976, requiring that delegates to the Convention be able to qualify for membership in the House of Representatives of the General Assembly, is unconstitutional under the Constitution of the United States.

After another appeal to the Supreme Court of Tennessee, the Supreme Court held, with one justice dissenting, that there was a compelling State interest involved that insures the separation of church and state, and hence Article IX, § 1, of the Constitution of Tennessee is not violative of the free exercise and establishment clauses of the First Amendment of the Constitution of the United States and the equal protection clause of the Fourteenth Amendment. On March 16, 1977, the appellant filed a notice of appeal to this Court from the final judgment of the Supreme Court of Tennessee.

The appellant applied for a stay of the Tennessee Supreme Court's decree of March 7, 1977, to Mr. Justice Stewart, which was denied March 17, 1977, because no previous application had been made to the Supreme Court of Tennessee. On March 28, 1977, the appellant filed an application for a stay from the Supreme Court of Tennessee which, on April 21, 1977, was granted for a period of 90 days from and after March 16, 1977. On June 20, 1977, the United States Supreme Court noted probable jurisdiction of this case. On June 21, 1977, the appellant filed, in the Supreme Court of Tennessee, an application for a stay pending disposition of this case in the Supreme Court of the United States. On June 28, 1977, the Supreme Court of Tennessee denied the appellant's application for a stay. The appellant then applied for a stay of the Tennessee Supreme Court's decree of March 16, 1977, to Mr. Justice Stewart, which was granted on July 6, 1977.

This case is now on appeal to this Honorable Court.

ARGUMENT

I

The Questions on Which the Decision of This Cause Depends Are So Insubstantial as Not to Need Further Argument.

In *Two Guys From Harrison-Allentown v. McGinley*, 366 U.S. 582 (1961) this Court had under consideration the question of whether a Pennsylvania Sunday Closing Law had as its purpose or had the effect of being religious, and one respecting the establishment of religion, or one unnecessarily infringing upon the First Amendment. In holding that the Sunday Closing Law was not religious, and did not violate the due process and equal protection clauses of the Fourteenth Amendment, this Court said that

> "Having carefully examined the entirety of the present legislation, the relevant judicial characterizations and, particularly, the legislative history leading to the passage of the 1959 Act immediately before us, we hold that neither the statute's purpose nor its effect is religious. See *McGowan v. State of Maryland*, supra, 366 U.S. at p. 449, 81 S.Ct. at p. 1117. Moreover, for the same reasons stated in *Mc Gowan v. State of Maryland*, supra, 366 U.S. at pages 449-452, 81 S.Ct. at pages 1117-1119, we reject appellant's contention that the State has other means at its disposal to accomplish its secular purpose that would not even remotely or incidentally give state aid to religion." p. 598.

In *Braunfeld v. Brown*, 366 U.S. 599 (1961), decided by this Court on the same day as *Two Guys From Harrison-Allentown v. McGinley*, supra, involving the same Pennsylvania Sunday Closing Law, this Court had under consideration the question of whether the Sunday Closing Law interfers with the free exercise of the appellant's religion. In discussing this issue this Court pointed out that

> "Certain aspects of religious exercise cannot, in any way, be restricted or burdened by either federal or state legislation. Compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden. The freedom to hold religious beliefs and opinions is absolute. *Cantwell v. State of Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213; *Reynolds v. United States*, 98 U.S. 145, 166, 25 L.Ed. 244. Thus, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, this Court held that state action compelling school children to salute the flag, on pain of expulsion from public school, was contrary to the First and Fourteenth Amendments when applied to those students whose religious beliefs forbade saluting a flag. But this is not the case at bar; the statute before us does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets.
>
> "However, the freedom to act, even where the action is in accord with one's religious convictions, is not totally free from legislative restrictions. *Cantwell v. State of Connecticut*, supra, 310 U.S. at pages 303-304, 306, 60 S.Ct. at pages 903-904. As pointed out in *Reynolds v. United States*, supra, 98 U.S. at page 164, legislative power over mere opinion is forbidden, but it may reach people's actions when they are found to be in violation of important social duties, or subersive of good order, even when the actions are demanded by one's religion. This was articulated by Thomas Jefferson when he said:
>
> > 'Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, *that the legislative powers of government reach actions only, and not opinions*, I contemplate with sov-

ereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced *he has no natural right in opposition to his social duties.*' (Emphasis added.) 8 Works of Thomas Jefferson 113. [Footnote omitted].

• • • • • • •

"Thus, in *Reynolds v. United States,* this Court upheld the polygamy conviction of a member of the Mormon faith despite the fact that an accepted doctrine of his church then imposed upon its male members the *duty* to practice polygamy. And, in *Prince v. Commonwealth of Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645, this Court upheld a statute making it a crime for a girl under eighteen years of age to sell any newspapers, periodicals or merchandise in public places despite the fact that a child of the Jehovah's Witnesses faith believed that it was her religious *duty* to perform this work.

"It is to be noted that, in the two cases just mentioned, the religious practices themselves conflicted with the public interest. In such cases, to make accommodation between the religious action and an exercise of state authority is a particularly delicate task, id., 321 U.S. at page 165, 64 S.Ct. at page 441, because resolution in favor of the State results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.

• • • • • • •

"To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the

exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly limitless.

"Needless to say, when entering the area of religious freedom, we must be fully cognizant of the particular protection that the Constitution has accorded it. Abhorrence of religious persecution and intolerance is a basic part of our heritage. But we are a cosmopolitan nation made up of people of almost every conceivable religious preference. These denominations number almost three hundred. Year Book of American Churches for 1958, 257 et seq. Consequently it cannot be expected, must less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test for determining whether the legislation violates the freedom of religion protected by the First Amendment." pp. 603-7.

This Court then affirmed the decision of the United States District Court for the Eastern District of Pennsylvania, 184 F.Supp. 352 (1959), dismissing the complaint after declaring that there was a sufficient state interest for the state and its people that there should be a uniform day of rest and the closing of all but a few limited types of businesses necessary for

the general public interest. The State of Tennessee likewise has a sufficient interest involved in this matter to exclude ministers from the General Assembly, that being the separation of Church and State.

This Court has recently affirmed the principle that while a person has a right to believe as he wishes, his freedom to act is subject to some reasonable limitations. In the case of *TransWorld Airlines (TWA) Inc. v. Hardison*, — U.S. —, 97 S.Ct. 2264, — L.Ed.2d — (June 16, 1977), a maintenance employee, subject to a seniority system established with a union, was required to work on a Saturday, contrary to the principles of a religion which he had adopted after beginning his work with the airlines, and which prohibited him from working on Saturday. After TWA made two attempts to accommodate the employee, but could not permit a change in his work shifts because of the union contract, the airlines refused to permit the employee to work only four days a week because of its needs for the employee's services on the weekends for the continuous operation of the airlines, and discharged the employee for refusing to work on Saturday. In concluding that TWA was justified in terminating the employee, this Court said that

> "Without a clear and express indication from Congress, we cannot agree with Harrison [the employee] and the EEOC that an agreed-up seniority system must give way when necessary to accommodate religious observances." p. 2274.

It is therefore respectfully submitted that because the grounds on which the decision of this cause depends are so insubstantial as not to need further argument, this Court should affirm the decision of the Supreme Court of Tennessee.

II

The Supreme Court of Tennessee Has Properly and Correctly Found That the Call for the Forthcoming Constitutional Convention, Chapter 848, Public Acts of 1976, Which Includes by Reference Article IX, § 1 of the Constitution of Tennessee, Is Fully Consistent With the Free Exericse of Religion, and Establishment Clauses of the First Amendment and Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

A. Free Exercise of Religion

The call for the Convention, under Chapter 848, Public Acts of 1976, including Section 4 of the Act, and the Constitution of Tennessee, Article IX, Section 1, are fully consistent with the free exercise of religion provided for by the First and Fourteenth Amendments of the Constitution of the United States.

The appellant McDaniel contends that the call for the Convention, Chapter 848, Section 4, Public Acts of 1976, and the Constitution of Tennessee, Article IX, Section 1, deprive him of the free exercise of his religion insofar as those provisions declare that "ministers of the Gospel and priests of any denomination" are ineligible to serve in either House of the Legislature. A review of the significant free exercise cases, however, reveals that these Tennessee provisions represent no infringement of appellee's right to believe. Moreover, although these provisions represent a minimal infringement of the appellant's right to act, that incidental burden is wholly justified by the governmental interest involved.

In the first place, while the right to believe is absolute, these provisions do not represent any interference with that right. In *Torcaso v. Watkins*, 367 U.S. 488 (1961), this Court invalidated a Maryland provision under which a "declaration of

belief in the existence of God" was required as a qualification for public office. The plaintiff in that case obviously had no recourse but to either lose his job or profess a belief wholly inimical to his own religious tenets.

Because the free exercise clause is predicated on the protection of individual belief and action, it is necessary to show some element of coercion in order to establish a violation thereof. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1965). Therefore, an enactment is not in violation of an individual's freedom of belief if it places no sanction on a religious belief or opinion, or if it does not force anyone to embrace a religious belief or to say or believe anything in conflict with his religious tenets, *Braunfeld v. Brown*, supra; see also, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Anderson v. Laird*, 466 F.2d 283 (D.C. C.A. 1972), *cert. den.* 409 U.S. 1076 (1972).

Viewed in this light, the Tennessee enactments in no way infringe upon the Rev. McDaniel's freedom to believe. We might assume that the appellant, as a Baptist minister, holds the beliefs and tenets of other Baptists. Nothing in the enactments impose a sanction for holding such beliefs or, as in *Torcaso*, supra, forces the appellant to say or believe anything inimical to his Baptist tenets. The Rev. McDaniel's disqualification is not grounded on his beliefs, but rather on the way he chooses to carry out those beliefs, on his actions. Therefore, the requisite element of coercion is simply not present to establish an infringement on the appellant's freedom to believe.

Admittedly, however, there is some infringement, but indirect, on the appellant's freedom of action. The appellant serves as a minister and his status as such disqualifies him from serving as a delegate to the Constitutional Convention. It is well established, however, that while the freedom to believe is absolute, freedom of action is not. *Cantwell v. State of Connecticut*, 310

U.S. 296 (1940). The State may reject certain religious acts where the conduct poses some substantive threat to public safety, peace or order. *Sherbert v. Verner*, 374 U.S. 398 (1963). See, *Reynolds v. United States*, 98 U.S. 145 (1879); *Braunfeld v. Brown*, supra; *State ex rel. Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975), *cert. den.* 422 U.S. 954 (1976). In *Reynolds* and in *Swann*, the burden placed upon the individual was direct and harsh since the enactments in those cases made a religious practice unlawful. Therefore, the State's interest in so doing must be substantial and compelling, and there must be a clear and present danger posed by a continuation of the practice. *Swann*, supra.

A different situation is presented where, as here, the practice itself is not unlawful, but where the law simply regulates a secular activity, and, as applied to an individual, operates so as to make the practice of his religious beliefs more expensive or inconvenient. *Braunfeld*, supra. In *Braunfeld*, the plaintiff, an Orthodox Jew shopkeeper, challenged Pennsylvania's Sunday Closing Laws. Since his religious tenets mandated that he keep his shop closed on Saturdays, Braunfeld claimed that the Sunday closing laws gave him an economic disadvantage as against his competitors and, in effect, penalized the free exercise of his beliefs. This Court, in upholding the statute, found a number of facts as persuasive. In the first place, although the state's original objective in passing the enactment was religiously motivated, the statute, in its current form, had the laudable secular goal of providing a uniform day of rest for all citizens. Secondly, the burden on the plaintiff was only indirect. The effect of the law was merely to inconvenience those members of the Orthodox Jewish faith who felt it necessary to work on Sundays. The enactments made no religious practice unlawful and did not affect all the members of any religious group. In such cases, where the goal is secular and the burden indirect, it would be unfair to require that the state show a compelling interest for the law. Rather the standard is far less rigid.

> "But if the state regulates conduct by enacting a general law within its power the purpose and effect of which is to advance the state's secular goals, the statute is valid despite its indirect burden on religious observance, unless the state may accomplish its purpose by means which do not impose such a burden."
>
> *Braunfeld*, supra, at p. 607

The appellees respectfully submit that following the *Braunfeld* analysis, the Tennessee enactments do not infringe upon the appellant's free exercise of religion or, more specifically, upon his freedom of action. The activity being rejected is a distinctly secular activity—that of serving in the general Assembly or as a delegate to the Constitutional Convention. It is entirely within the power of a state legislature to set the qualifications for its members. *Walker v. Yucht*, 352 F.Supp. 85 (D.C. Dela. 1972). Furthermore, while the original motivation for the enactment may have been religiously motivated—to ensure that ministers are not "diverted from the great duties of their functions,"— the enactment's current purpose and effect are distinctly secular—to ensure the necessary separation between church and state. Inasmuch as that separation is the touchstone of the First Amendment, it is surely a valid secular objective for any legislation, *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

Not only are the objectives of the enactments and the regulated activity both of a secular nature but, as in *Braunfeld*, the burden on the religious practice is indirect. The enactments do not make it unlawful for appellant to serve as a minister, nor do they impose any sanction on that activity. Furthermore, the provisions do not place a burden on all Baptists, or on the members of all religious groups. The burden falls only on those who feel it necessary to become members of the clergy. As to this latter group, the provision merely excludes them from one activity—that of serving on the State Legislature or as a delegate

to the Constitutional Convention. While this may cause inconvenience or result in some sacrifice, it does not bar them from the practice of their religion. Surely, this sacrifice is not great compared with the dangers inherent in the entanglement of church and state.

Finally, as in *Braunfeld*, supra, there are no acceptable alternatives for the State to ensure the continuation of the requisite "wall of separation" between church and state. Ministers and priests are, of necessity and by choice, *agents* of their churches and their congregations. While the layman may feel a duty to abide by the tenents of his religion, the minister or priest has a broader duty also to abide by the dictates of his superiors in the organized hierarchy of his church. This is not to say, of course, that his duty to his church will always be inconsistent with his duties as an elected representative, but it is to suggest that the potential for conflict is far greater with a priest and minister than it is with a layman. We must never forget that many of the original settlers were dissenters who wanted to escape from the tyranny of an organized state religion. The First Amendment, with its concomitant spirit of separation of church and state, was drafted with these people in mind. Certainly, the Tennessee enactments, insofar as they seek to preserve this essential separation, do not deprive the appellant of the free exercise of his religion.

B. The Establishment Clause of the First and Fourteenth Amendments

The call for the Convention, Chapter 848, Public Acts of 1976, including Section 4, and the Constitution of Tennessee, Article IX, Section 1, are fully consistent with the Establishment Clause of the First and Fourteenth Amendments of the Constitution of the United States.

The appellant McDaniel further contends that the Tennessee enactments, insofar as they penalize only Christian ministers and priests for assuming leadership roles, is a violation of the Establishment Clause of the First and Fourteenth Amendments to the Constitution of the United States.

The intention of this clause was to "erect a wall of separation between church and state," by insuring that the government did nothing to prefer one religion over another, or to aid or inhibit one religion or all religions. *Everson v. Board of Education*, 330 U.S. 1 (1947). As appellant admits, one facet of this definition is aimed at prohibiting all sectarian bias on the part of the State. This concern has led to the interesting interplay between the Free Exercise Clause and the Establishment Clause. The enactment of affirmative legislation designed to inundate the free exercise rights of one group, may bring a legislature into conflict with the Establishment Clause insofar as the legislation gives to one group a special right or privilege. See, *O'Malley v. Brierley*, 477 F.2d 785 (3d Cir. 1973).

Contrary to the appellant's contention, there is no sectarian bias in favor of Christian ministers and priests in the Tennessee enactments. It can hardly be questioned that for the drafters of the Constitution of Tennessee, in their own limited frame of reference, the phrases "ministers of the Gospel and priests of any denomination" meant what the broader more inclusive term "clergy" means to us. (Webster's *New International Dictionary, 2d ed.* (1952) defines "clergy" as "the priesthood, or body of adepts of any religion"). Obviously, the framers of that enactment attempted a more inclusive class through their addition of the phrase, "priests of any denomination whatsoever." This semantic confusion does not render the enactment incapable of interpretation; nor does it raise entanglement problems. As the appellees point out, clergymen are the subject of numerous statutes relating to their exemption from such things as jury

duty and the draft. Courts have obviously developed a considerable amount of expertise in interpreting such terms as "ministers," "priests," and "clergy." Because the Tennessee enactments apply to all "clergy," they demonstrate no sectarian bias.

A more difficult question is posed by the claim that the enactments might violate the Establishment Clause by favoring or inhibiting all religious. Under the three-pronged test proposed in *School Dist. of Abington Township v. Schempp*, supra, however, there is no "establishment" of religion. In the first place, the enactments represent the distinctly secular legislative purpose of preserving the separation of church and state. While it is arguable that the original purpose may have been more religiously motivated, *Braunfeld v. Brown*, supra, demonstrates that what is controlling is the current purpose.

The primary effect of the legislation is neither the advancement nor inhibition of religion. In limiting the exclusion only to clergymen of any religion, the enactments confer no benefit or detriment to "religion." It is inconceivable how any religious group in Tennessee would be hindered or helped by the mere fact that their clergy could not run for the state legislature. There is no nexus between the two. See: *Walz v. Tax Comm.*, supra. Indeed, the only possible effect of the enactments is that which serves as their objective—the assured separation of church and state.

Finally, the enactments represent no excessive government entanglement with religion. As we pointed out before, because of the substantial case precedent with regard to interpreting such terms as "ministers," "priests," and "clergy," there need not be any entanglement problems involved in determining who comes under the enactment's exclusion. Moreover, there is nothing in the enactments themselves that prohibits anyone from becoming a clergyman, or that dictates to religious groups whom they

should appoint as clergy. Because the enactments fully comply with the *Schempp* test, and because they demonstrate no sectarian bias, they are not in violation of the Establishment Clause.

C. Equal Protection Under the Fourteenth Amendment

The call for the Convention, Chapter 848, Public Acts of 1976, including Section 4, and the Constitution of Tennessee, Article IX, Section 1, are fully consistent with the Equal Protection Clause of the Fourteenth Amendment.

The appellant McDaniel further contends that the Tennessee enactments are in violation of his right to vote and his freedom of association secured by the Fourteenth Amendment. The Tennessee enactments, however, infringe neither upon the appellant's right to vote nor upon his right of political candidacy as that right may be related to his freedom of association.

In the first instance, as in any Equal Protection case, it must be determined whether the Court should apply the rational basis test, or the more rigid strict scrutiny—compelling state interest test. The latter is generally applied only when the challenged state action affects some fundamental right, or where the state's classification is based on a suspect criteria. *Walker v. Yucht*, supra. The Appellees respectfully submit that the rational basis test is the appropriate test to apply in this case, and that applying such a test reveals that there has been no Equal Protection violation.

In support of this contention, it should be noted that there is no fundamental right to hold political office. *Turner v. Fouche*, 396 U.S. 346 (1970). In *Turner*, plaintiffs were denied consideration for appointments to the board of education because they were not freeholders. Since this classification, on the basis of wealth, constituted invidious discrimination the Court, there, never went on to consider the question of which test should be applied.

Where, however, as in the case at bar, there is no fundamental right involved and no invidous discrimination, courts will often consider the impact of the legislation. Since the right of political candidacy is often tied to the rights of voters (which are fundamental), courts will colsely scrutinize that legislation that has a real and appreciable impact on the right of franchise. *Bullock v. Carter*, 405 U.S. 134 (1972). In *Bullock*, the United States Supreme Court strictly scrutinized Texas legislation which set inordinately high registration fees for primary candidates, because, as the Court found, that legislation substantially limited the field of candidates and had a particularly harsh effect on poor voters who were unable to contribute toward the registration fees of their candidates. Viewed in this perspective, *Bullock* "is merely a new application of the general axiom that statutory arrangements colliding with the right to vote in such a way as to burden the voting power of discrete minority groups must be closely scrutinized." *Walker v. Yucht*, supra.

As in *Walker*, which upheld a htree-year residency requirement for certain candidates, there is no substantial impact in the case at bar, nor burden placed on any group of voters. The impact of the candidacy restriction is unrelated to the wealth of the candidate or the wealth of his supporters. Moreover, there is no evidence that any one group of voters would prefer the candicay of a clergyman. Finally, because the restriction agects comparatively so few people, the restriction does not substantially limit voter choice. For these reasons, the rational basis test should be applied to determine the validity of the enactments.

In applying the rational basis test, it must be asked whether the classification has a reasonable basis for the achievement of a legitimate state goal. As has already been indicated, these enactments favored the laudable objective of the separation of church and state. Inasmuch as this is the touchstone of the First Amendment of the Constitution of the United States, it

is obviously a legitimate state interest. Moreover, although it may be incapable of proof, there is no reason to assume that the enactments do not forward this objective. While it does not necessarily follow that a clergyman's duty to his superiors will conflict with his duty to the state, the potential for conflict is clear; there is certainly a sufficient nexus to justify the legislation. Finally, it is urged that the Court should determine its limited role in passing on matters so uniquely within the purview of the Legislature. The Court, in *Walker*, was obviously cognizant of this, in noting,

> "Our role is not that of a 'super-legislature.' Instead, we confine our power, in cases of this kind, to determining whether the state's asserted interests are legitimate and whether the chosen means are related to the achievement of the State's goals. Any change in the Delaware Constitution in this regard should come, if at all, from the people of Delaware." p. 100
>
> *Walker v. Yucht*, supra.

The appellant's contention that he has a right of political candidacy based on the fundamental right of freedom of association, is equally untenable. The principal support for appellant's contention is *Williams v. Rhodes*, 393 U.S. 23 (1968), which dealt with an Illinois statute which made it virtually impossible for candidates from any political party, other than the Republican and Democratic Parties, to get on the ballot. The right of political candidacy found therein was based on the right of individuals to associate for the advancement of political beliefs. Since the Rev. McDaniel's party was not discriminated against as a group, freedom of association is surely not at issue in this case.

D. **Vagueness**

The call for the Convention, Chapter 848, Public Acts of 1976, including §4, is sufficient to let the general public know that ministers, as used in the call and Article IX, §1 of the Constitution of Tennessee, mean those who are ordained according to the usages of some church or associated body for performing the duties of the pastorial office.

As used in Article IX, §1, of the Constitution of Tennessee, it is contemplated that those ministers who, by performing in a professional manner for the needs of the members of their congregation, are the subject of the exclusion from being a member of the General Assembly of Tennessee. The appellant cannot say that he has ever had any doubt that he is a minister, and under the disqualifying provisions of Article IX, §1 of the Constitution of Tennessee, cannot be a member of the General Assembly of the Constitutional Convention, as provided for by Chapter 848, Public Acts of 1976.

If there is any doubt about what a "minister of the Gospel" is, this Honorable Court can and should restate its previous definition of the term "minister." This Court has, on at least two occasions, undertaken to define the term "minister", as used in connection with the Universal Training and Service Act. See e.g., 50 U.S.C.A. Appendix, §451, *et seq*. In the case of *Dickinson v. United States*, 346 U.S. 389, 394-5, 74 S.Ct. 152, 156-7, 98 L.Ed. 132, 137 (1953), this Court held

> "Certainly all members of a religious organization or sect are not entitled to the exemption by reason of their membership, even though in their belief each is a minister. Cf. *Cox v. United States*, 1947, 332 U.S. 442, 68 S.Ct. 115, 92 L.Ed. 59. On the other hand, a legitimate minister cannot be, for the purposes of the Act, unfrocked simply because all the members of his sect base an ex-

> emption claim on the dogma of its faith. That would leave a congregation without a cleric. Each registrant must satisfy the Act's rigid criteria for the exemption. Preaching and teaching the principles of one's sect, if performed part-time or half-time, occasionally or irregularly, are insufficient to bring a registrant under § 6(g). These activities must be regularly performed. They must, as the statute reads, comprise the registrant's 'vocation.' "

See also: *Niznik v. United States*, 184 F.2d 972 (1950).

The Tennessee Courts have, on at least two occasions, defined the term "vocation." In the case of *Frierson v. Ewing*, 32 Tenn. App. 366, 222 S.W.2d 678 (1949) our Court of Appeals held that

> "The word 'vocation' is one in common use and means a calling or occupation or business in which one engages more or less regularly. Whether one is engaged in the real estate business 'as a whole or partial vocation,' we think, is a question of fact to be determined upon all the circumstances appearing." p. 371.

In *Tucker v. Jollay*, 43 Tenn. App. 655, 311 S.W.2d 324 (1957) the same court held that

> "A 'vocation' connotes some kind of employment, business, profession or calling." p. 658.

In view of these common sense provisions of the Constitution of Tennessee, and the definitions of minister and vocation, it is respectfully submitted that there can be no doubt about the meaning of the term "Minister of the Gospel" to an ordinary man, and particularly the appellant, and that the term is not unconstitutionally vague.

SUMMARY

The Attorney General of the State of Tennessee respectfully submits that the questions on which the decision of this cause depend are so insubstantial as not to need further argument. While there is an absolute freedom to believe, the freedom to act can be limited if there is a sufficient state or other interest involved.

In this cause there is no attempt to regulate the practice of religion. The Attorney General contends, however, that if the appellant chooses to retain his office of full time minister of a Baptist Church, the State has a sufficient basis, the separation of church and state, to limit his activities of a secular nature.

No attempt has been made in either the call for the Convention or the disqualification provisions of the Constitution of Tennessee in question, to establish any type of religion in the State of Tennessee. The term "ministers of the Gospel and priests of any denomination" includes the clergy of any and all religions or sects.

There is no denial of the appellant's rights under the equal protection provisions of the Fourteenth Amendment of the Constitution of the United States. There is no fundamental right to be a candidate for or hold any political office.

The term "ministers of the Gospel and priests of any denomination" is sufficiently clear when considered with the other language in the disqualification section of the Constitution of Tennessee in question, to put the public on notice that those ministers who vocation is that of full time ministers are disqualified under the Constitution of Tennessee.

CONCLUSION

Based on the foregoing it is respectfully submitted that the decision of the Supreme Court of Tennessee should be affirmed, because it has properly and correctly found that the call for the Constitutional Convention is fully consistent with the provisions of the First and Fourteenth Amendments of the Constitution of the United States.

Respectfully submitted,

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This 2nd day of September, 1977.

. . . . . .

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76-1427

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. A-12 (76-1427)

REV. PAUL A. McDANIEL,
Appellant,

v.

SELMA CASH PATY, a Resident of Hamilton County, Tennessee; SHIRLEY HASSLER, as Coordinator of Elections of the State of Tennessee; LYTEL LANDERS, as Chairman of the State Election Commission of Tennessee; RAY BLANTON, as Governor of the State of Tennessee; BROOKS McLEMORE, as Attorney General of the State of Tennessee; JOE C. CARR, as Secretary of State of Tennessee; JAMES HARPSTER, TOMMY POWELL, RICHARD HOLCOMB, JACK SEATON, as Members of the State Election Commission of Tennessee; CHARLES HINSON, Chairman of the Hamilton County Election Commission; CLAUDE CLARK, TOMMIE CARTER, JAMES PENLEY, ALBERT W. SECOR, as Members of the Hamilton County Election Commission; TOM MOORE, JR., as Registrar-at-Large for the Hamilton County Election Commission,
Appellees.

On Appeal from the Supreme Court of Tennessee

BRIEF FOR APPELLEE
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Other Citation:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. A-12 (76-1427)

REV. PAUL A. McDANIEL,
Appellant,

v.

SELMA CASH PATY, a Resident of Hamilton County, Tennessee; SHIRLEY HASSLER, as Coordinator of Elections of the State of Tennessee; LYTEL LANDERS, as Chairman of the State Election Commission of Tennessee; RAY BLANTON, as Governor of the State of Tennessee; BROOKS McLEMORE, as Attorney General of the State of Tennessee; JOE C. CARR, as Secretary of State of Tennessee; JAMES HARPSTER, TOMMY POWELL, RICHARD HOLCOMB, JACK SEATON, as Members of the State Election Commission of Tennessee; CHARLES HINSON, Chairman of the Hamilton County Election Commission; CLAUDE CLARK, TOMMIE CARTER, JAMES PENLEY, ALBERT W. SECOR, as Members of the Hamilton County Election Commission; TOM MOORE, JR., as Registrar-at-Large for the Hamilton County Election Commission,
Appellees.

On Appeal from the Supreme Court of Tennessee

BRIEF FOR APPELLEE
Selma Cash Paty

QUESTIONS PRESENTED

I

Does the Legislative Call for the Constitutional Convention, 1976 Public Acts of Tennessee, Chapter 848, Section 4, Violate First Amendment Provisions of the United States Constitution Concerning the Free Exercise of Religion?

II

Does the State Statute Violate First Amendment Provisions of the United States Constitution Concerning Establishment of Religion?

III

Does the State Statute Violate Fourteenth Amendment Provisions of the United States Constitution Concerning Equal Protection of the Laws?

IV

Does the State Statute Violate Fourteenth Amendment Provisions of the United States Constitution in Denying Due Process by Being Vague?

V

Does the State Statute Amount to a Religious Test as a Condition to Holding Office?

VI

Is the Question Presented by This Appeal Now Moot?

STATEMENT OF THE CASE

This is an appeal from a decision of the Supreme Court of Tennessee rejecting appellant's contention that his disqualification pursuant to Tennessee State Law as a delegate to the Tennessee Limited Constitutional Convention is a denial of his Federal Constitutional rights to free exercise of religion, is an establishment of religion in conflict with the First Amendment, is a denial of his right to vote, is a violation of Equal Protection of the Laws, is based upon an unconstitutionally vague law, and subjects him to a religious test in order for him to qualify as a candidate. The brief on behalf of appellee, Selma Cash Paty, answers the contentions of appellant in this order, and it raises the additional question of whether the case might not now be moot.

ARGUMENT

I

The Legislative call, Public Acts 1976, Chapter 848, Section 4, established qualifications for delegates to the Limited Constitutional Convention the same as those for membership in the Tennessee House of Representatives.

> "SECTION 4. Any citizen of the state who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for delegate to the convention upon filing with the County Election Commission of his county a nominating petition containing not less than twenty-five (25) names of legally qualified voters of his or her representative district."

Article IX, Section 1 of the Constitution of Tennessee provides as follows:

> "Section 1. Ineligibility of ministers and priests to seats in legislature.—Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of souls, and ought not to be diverted from the great duties of their functions; therefore, no Ministers of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature."

The Tennessee Supreme Court found in *Paty v. McDaniel*, 547 S.W. 2d 897, that service in the legislature is "purely secular activity", and this brief adopts the position that there is no limitation on the free exercise of religion imposed by Article IX, Section 1. Service in the Tennessee Legislature cannot be considered to be a right to free exercise of religion guaranteed by the First Amendment under the facts of this case. There is no allegation in the record of this case to indicate that appellant intends now, or ever, to leave his ministry because of

his desire to serve as a delegate to the Limited Constitutional Convention or to become at some future time a candidate for a seat in either House of the Tennessee Legislature.

By appellant's testimony, it can be seen that, whatever burden appellant contends is imposed upon his free exercise, it is one that does not compulsively require the abandonment of any of his religious beliefs, which may well include being a minister of his faith but which, in the absence of proof in the record to support the claim, does not include being a convention delegate or member of the Tennessee General Assembly.

As the questioned statute relates to the exercise of his religion, appellant offered no testimony which would indicate that the statute inhibited the exercise of his religious prerogatives in the past, present or future. The testimony is lean, but it illustrates the contrary to a valid "free exercise" complaint:

> Q. "And do you intend to resign as a minister of the gospel if you were to be elected?
>
> A. No . . .
>
> A. I have no intention to resign from the congregation."
>
> (Bill of Exceptions, page 8.)

Appellant's candidacy as a convention delegate was not shown in the proof to have been dictated by the tenets of the Missionary Baptist faith or to have been the result of a privately inspired or personally held religious conviction. Appellant's choice to have become a candidate for election, not having been made in response to some religious stimulus, does not make a case for striking down this statute upon the strength of a free exercise challenge, presenting as it does in this case a theoretical question which does not exist in fact.

This Court has previously stated that "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203. It should be emphasized that if appellant's challenge is to succeed on free exercise grounds, the burden is upon him to show the coercive effect of the law *in his religion*. It was expressly found by the Supreme Court of Tennessee in *Paty v. McDaniel, supra*, that if any burden can be said to exist on the exercise of religion, "it is indirect, miniscule, and does not make unlawful any religious practice." 547 S.W. 2d at 905.

The degree of the burden upon the free exercise of religion should be actual rather than theoretical in order for a First Amendment challenge to be upheld, and the characterization as an "indirect" burden does little to clarify whether the Tennessee Constitution, Article IX, Section 1 is an impermissible one. A definition of "indirect burden" in the context of free exercise clause cases was supplied by Chief Justice Warren in *Braunfeld v. Brown*, 366 US 599, as "legislation which does not make unlawful the religious practice itself." 366 US at 608. There are, admittedly, indirect burdens which have been found to inhibit the free exercise of religion to the extent that the questioned legislation unconstitutionally conflicted with First Amendment rights; however, these successfully challenged state actions were not found to have been sufficiently grounded upon such a compelling state interest as to warrant the inhibition of free exercise of religious rights.

Such a case is *Sherbert v. Verner*, 374 U.S. 398, which decided upon free exercise grounds that a Seventh-Day Adventist was not ineligible for benefits under South Carolina's unemployment compensation law because of her unavailability for work on Saturdays. The Court found that conditioning the receipt of benefits upon the "appellant's willingness to violate a cardinal principal of her religious faith effectively penalizes the free exercise of her constitutional liberties." 374 US at 406. However,

this factual situation is not analogous to appellant's case because the exigencies of survival demand that a member of our society have an income whether in the form of earnings or other compensation whereas service in the legislature is a voluntary activity which involves no element of coercion.

The rule which appellant would have this Court adopt is that *any* burden on the free exercise of religion whether those burdens are real or merely potential violates First Amendment rights. Yet, in the recent case of *Trans World Airlines v. Hardison*, — U.S. —, 97 S.Ct. 2264, the Court decided that an employer has a duty under the Civil Rights Act to make "reasonable accommodations" to the religious needs of its employees. Congress recognizes by including a standard of reasonableness into Section 703(a)(1) of the Civil Rights Act of 1964, Title VII, that the right to exercise one's religion is not absolute, and by deciding the case on grounds other than those involving the question of free exercise of religion, the Court also recognizes that there are permissible legislative burdens which can be placed on the right.

If the Tennessee Supreme Court's decision is to withstand apppellant's constitutional challenge, it must be either because appellant's disqualification from candidacy is not an infringement by the State of his constitutional rights of free exercise, or "because any incidental burden on the free exercise of appellant's religion must be justified by compelling state interest in the regulation of a subject within the State's constitutional power to regulate." *School District of Abington v. Schempp*, 374 US at 403. Political candidacy is unquestionably a subject within the state'e power to regulate, indeed the Constitution of the United States established certain qualifications for candidates for election to public office. Representatives must be 25 years of age, a citizen for 7 years and an inhabitant of the State from which he or she is chosen. (Article I, Section 2). A senator must be 30 years of age, a citizen for 9

years and an inhabitant of that state. (Article I, Section 3). No person holding any office under the United States may be a member of congress. (Article I, Section 6). Only natural born citizens may serve as President of the United States. (Article II, Section 1).

The Tennessee Supreme Court found that,

> "The effect of Tennessee's constitutional provision prohibiting service in the General Assembly is to advance the State's goal of maintaining the separation between church and state, an imperative, constitutionally equal to the free exercise mandate. In our opinion, it is far higher on the scale of legitimate state goals than the mere convenience of having everyone rest on the same day, which sufficed in *Braunfeld*." *Paty v. McDaniel*, 547 S.W. 2d at 905.

A compelling state interest is to preserve the neutral governmental attitude toward religion which the Establishment Clause was intended to promote. Appellant argues that "no state interest in a 'wall of separation' which diminishes federal rights of free exercise is compelling." (Appellant's Jurisdictional Statement, page 8). The case of *Braunfeld v. Brown, supra*, decided precisely otherwise, holding as it did that there was a state interest in having a uniform day of rest in the state sufficiently compelling to permit the enforcement of Sunday closing laws to the admitted detriment of members of religious groups observing a Sabbath day other than Sunday, the religious observance of which is a federally guaranteed right.

On the other hand, in *Sherbert v. Verner*, the Court was not persuaded by the compelling state interest argument that unscrupulous claimants would feign religious objections to Saturday employment in order to avail themselves to the unemployment compensation fund because, in part, the objection had not

been made in the state supreme court, and the Court was "unwilling to assess the importance of an asserted state interest without the views of the state court." 374 US at 407. Where, as here done by the Tennessee Supreme Court, the highest court of a state has approved a constitutional provision of that state unchallenged and unaltered for 180 years, its decision should not be disturbed without employing "the most critical scrutiny" in order to avoid radically restricting a state's legislative latitude. *Braunfeld v. Brown, supra.*

A workable test for determining the validity of laws in conflict with the free exercise clause was employed in *Braunfeld v. Brown,*

> "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden." 366 US at 607.

It is submitted, and the Tennessee Supreme Court found, that having ministers of any faith serve in the legislature would undermine the "compelling state interest" in prepetuating the First Amendment policy of maintaining the wall of separation of church and state by insuring that members of the legislature are not professionally concerned with an established religion. By inference from the *Paty v. McDaniel* decision, the Tennessee court found that the nature of the call of a minister is to lead and teach the members of a particular religious group and to foster the precepts and doctrines of that group to which he is primarily devoted.

It is a permissible distinction between members of the ministerial profession and members of any other profession because of the reasonably foreseeable conflict between a minister's divinely influenced mandate in the promotion of his religious views and the prohibition of the Establishment Clause. The policy sought to be perpetuated was stated in *Everson v. Board of Education,* 330 U.S. 1, as preserving civil liberty by rescuing "the temporal institutions from religious interference." The dual aspect of the constitutional inhibition in the area of legislation in matters of religion, operating as it does to maintain the wall of separation of church and state, affords self-protection to both institutions.

> "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." *Everson v. Board of Education,* 330 U.S. at 16.

It is plain that religious intrusion into the governmental sphere, as observed by this Court in *Abington School District v. Schempp, supra,* would ultimately have the same coercive effect as governmental interference with religion, indirectly compelling religious minorities to conform to the prevailing officially approved religion. Appellant argues that the apprehensions of the Tennessee Court that the candidacy of ministers to the legislative body in the state would result in a political cleavage along religious lines is unwarranted. (Appellant's Jurisdictional Statement, p. 20.) However, this Court has expressed the same type of apprehension concerning the combination of government and religion in *Abington School District v. Schempp, supra*:

> "The wholesome 'neutrality' of which the Court's cases speak this stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official

support of the State or Federal Government would be placed behind the tenets of one or all of the orthodoxies." 374 U.S. at 222.

II

Appellant's claim that this state action is an establishment of religion exists only theoretically, and appellant has not demonstrated how rights peculiar to him are adversely affected in respect to an establishment of religion. He is the only party before the Court claiming the infringement of constitutional rights, and the nature of his claim is not based upon a factual circumstance giving rise to any injury to him or an infringement of his fundamental rights by state action in the area of establishment of religion. There is lacking in the basis of appellant's claim "a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast v. Cohen*, 392 U.S. 83, 102.

Appellant states in this brief that "the purpose of the draft exemption [pertaining to ministers] is to enhance free exercise of religion in the United States—to "guard against a flock being without its shepard (*sic*)", citing *Fitts v. United States*, 334 F. 2d 416, and that "the exclusion of the rental value of the parsonage enhances the free exercise of religion by in much the same way as the draft exemption approved by the Fifth Circuit in *Fitts*—it enhances the accessibility of the clergy to their parishioners." (Brief for Appellant, p. 7).

It seems obvious that the same reasoning upon which appellant relies in his brief is contrary authority for the proposition that the exclusion of clergy as constitutional convention delegates is an establishment of religion. If it is permissible to enhance the free exercise of religion by giving a draft exemption or a tax exemption so that the clergy is more accessible to its congregation, it seems to be equally permissible to provide this same accessibility by exempting the clergy in the manner of the statute in question.

Appellant's argument is that establishment of no religion is as prohibited as establishing religion itself; however, the historical context of the Federal Constitutional prohibition against establishment of religion contemplated the establishment of one particular faith to the detriment and expense of others. However, appellant's reliance on the draft and tax exemption situations seems not to be subject to the claim that they are establishment of religion and by logical analogy nor should the Tennessee statute in question.

III

Appellant contends that he has been denied Equal Protection in that he has been deprived of federally secured rights of voting and political candidacy as a result of the decree of the Tennessee Supreme Court.

The prevailing standard for determining the constitutional limits of a state's power over its own elections involves consideration of the "facts and circumstances behind the law, the interest which the state claims to be protecting, and the interest of those who are disadvantaged by the classification." *Williams v. Rhodes*, 393 U.S. 23, 30. The classification of ministers as it applies to delegates to the Tennessee Constitutional Convention is a permissable one because the classification exists for the protection of an important state interest. The maintenance of a government free from the threat of religiously sectarian influence which might reasonably result in the establishment of religion, is a fundamental constitutional principal of the First Amendment and an important state interest, the promotion of which possibly involves the infringement to some degree of other valid fundamental rights of individuals.

Where the balancing of these competing state interests and individual rights involves the classification of individual groups and results in the asserted loss of fundamental rights, certain

tests have been formulated to determine if state action violating the Equal Protection Clause is permissible. The application of these tests involves looking to "the character of the classification in question; the individual interest affected by the classification and the governmental interest asserted in support of the classification." *Dunn v. Blumstien*, 405 U.S. 330, 335. A compelling state interest must be demonstrated in order for the classification to be constitutionally permissible where it infringes upon a constitutionally protected right, and without regard to whether any less stringent test may be applicable appellee contends that a compelling state interest has been demonstrated. The state interest in maintaining separation of church and state in this case is certainly more compelling than in having a uniform day of rest as in *Braunfeld v. Brown, supra*.

This state interest is of such magnitude as to distinguish this case from those cited by appellant dealing with filing fees, property requirements or minority parties, where the Court was unable to discern any significant state interest. See, *Lubin v. Panish*, 415 U.S. 709 (state interest eliminating frivolous candidates did not justify filing fee); *Turner v. Fouche*, 396 U.S. 346 (no justifiable state interest in freeholder qualifications for school board elections); *Williams v. Rhodes, supra* (no compelling state interest in restricting the ability of a minority party to gain a position on the ballot). Unlike these cases which involved protection of the rights of freedom of association directly affecting indigents, the arguable infringement in this case applied to a class upon whom it has not been demonstrated to have any substantial impact.

Other cases have found a compelling state interest in legislation placing limitations upon the elective process, acknowledging that "the state's strong interest in maintaining the integrity of the political process" outweighed any restrictions imposed upon the right to vote. *Storer v. Brown*, 415 U.S. 724, 731. In *Jenness v. Fortson*, 403 U.S. 431, for example,

the Georgia requirement that independent voters file a nominating petition signed by five percent of the electorate was upheld as reasonably related to the state's interest in the elective process.

The classification of which appellant complains is not an "invidious" one subject to constitutional challenge. The classification of ministers has been the subject of favorable class legislation in other contexts under both the Tennessee State law and under the federal law. One example was the exclusion of ministers from the draft under the Selective Service Act of 1967, 50 U.S.C. Section 456(g):

> "Regular or duly ordained ministers of religion, as defined in this title . . ., and students preparing for the ministry under the direction of recognized churces or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing theological or divinity schools in which they have been pre-enrolled, shall be exempt from training and service but not from registration—under this title."

Ministers have also been given specific exemptions from taxation for certain types of income.

> 26 U.S.C.A. § 107. Rental value of parsonages in the case of a minister of the gospel, gross income does not include—
>
> (1) the rental value of a home furnished to him as part of his compensation; or
>
> (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home.
>
> 26 U.S.C.A. § 1402. (a) Net earnings from self-employment.—The term 'net earnings from self-employment'

means the gross income derived by an individual from any trade or business carried on by such individual . . . except . . . (8) an individual who is duly ordained, commissioned, or licensed minister of a church or a member of a religious order shall compute his net earnings from self-employment derived from the performance of service described in subsection (c) (4) without regard to Section 107 (relating to rental value of parsonages), Section 119 (relating to means and lodging furnished for the convenience of the employer), Section 911 (relating to earned income from sources without the United States), and Section 931 (relating to income from sources within possession of the United States).

26 U.S.C.A. §3401. (a) Wages.—For the purposes of this chapter, the term 'wages' means all remuneration . . . for services performed by an employee for his employer, . . . except that such term shall not include remuneration paid

—

(9) for services performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

It is submitted that if a classification of ministers is not unconstitutionally arbitrary or invidious for the purpose of the statutes cited above, then that classification does not violate the Equal Protection Clause as applied to the Tennessee Constitution. Nor, is this arbitrary class legislation any more than the preventing a federal judge from being a member of the United States Congress under the United States Constitution, Article I, Section 6, is arbitrary class legislation. There is, of course, a legitimate and compelling state interest in maintaining the separation of powers by barring judges from service in the legislature, but this does not rank higher on the scale of legitimate state interests than separation of church or state.

IV

Appellant raises a challenge to the decision below on the basis that the words "minister" and "priest" in the Tennessee Constitution, Article IX, Section 1, are unconstitutionally vague. As demonstrated by the Internal Revenue Code, the federal government has had no difficulty with the definition, and this terminology has not proven to be judicially unmanageable in the past.

Appellant's challenge to the vagueness of the section involves the application of Article IX, Section 1, and not its effect. It should be assumed that the Tennessee courts are able to define the term and to determine applicability as it relates to actual cases where the definition of the terms relate to real issues rather than to hypothetical situations. The Tennessee courts are certainly as equal to the task as the federal courts have been in construing the term "ministers" in such cases, for example, as *Dickinson v. United States*, 346 U.S. 389, and *Cox v. United States*, 332 U.S. 442.

Appellant raises no claim that the term "minister" is vague as it applies to him, and states in his own testimony the following:

Q. "And what is your profession?

A. I am a minister."

(Bill of Exceptions, p. 3.)

Hypothetical applications of the word "minister" are of intellectual interest only and are evasive of the issue of whether the section applies in the present situation. As this Court stated in *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 86 fn 9, "it is not the sort of vagueness that leaves those subject to a statute uncertain about what is required of them." The Court further states that "[i]n the case where applicability of the statute is uncertain, abstension is proper." Id.

V

Appellant claims that the requirements for service as a delegate to the Tennessee Limited Constitutional Convention amount to a religious test in violation of Article VI, Clause 3 of the Federal Constitution. The language of Article VI, which states that "no religious test shall ever be required as a qualification to any office or public trust under the United States," is limited in its application to positions in the Federal Government. The application of this section to the states by way of the First and Fourteenth Amendments to the Constitution may have been answered in *Torcaso v. Watkins*, 367 U.S. 488; however, it seems more likely that this decision striking down Maryland's requirement of an oath of affirmance in the belief of God as a condition to holding public office was decided on First Amendment grounds alone.

Appellee contends that the *Torcaso* case is not analogous to the case under examination here because the prohibition against the service of the clergy as constitutional convention delegates is not a religious disqualification but is a professional one. It is conceivable that a group could be organized which is anti-religious, which believes in no divine being and which has ministers similar to those of other organized religious faiths. By the terms of the disqualifications under examination here, ministers of these groups also would not be permitted to serve as delegates with regard not to their belief in God but with regard to their professional standing.

The State of Tennessee in adopting Article IX, Section 1, of its constitution recognized that this was a professional disqualification as contrasted to a religious one as can be seen by the fact that it exists alongside with Tennessee Constitution, Article I, Section 4, which provides as follows:

> "That no political or religious test, other than an oath to support the Constitution of the United States and of this

> State, shall ever be required as a qualification to any office or public trust under this State."

The co-existence of these two provisions of the Tennessee Constitution give strong evidence that there is no conflict between them in purpose, intent and effect. Article I, Section 4 serves to promote religious freedom in Tennessee by forbidding religious tests as a condition to holding public office, and Article IX, Section 1 promotes the same goal by closing the avenue for a professional concern with an organized faith to destroy the separation between church and state which the Tennessee Constitution also seeks to construct in Article 1, Section 3, which provides as follows:

> "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship."

VI

The existence of a "case" or "controversy" within the meaning of Article III, Section 2 of the Federal Constitution is an indispensable requirement to the exercise of the jurisdiction of federal courts, providing as it does that:

> "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution."

By virtue of the stay order which was issued by this Court on July 6, 1977, appellant was seated as a delegate to the Tennessee Limited Constitutional Convention. By the express provisions of 1976 Tennessee Public Acts, Chapter 848, Section 8,

the convention shall not have the power to meet beyond July 31, 1978, and the great likelihood is that the work of the convention will have concluded and the convention itself will have adjourned permanently before that date.

> "Section 8. The final action of the convention with respect to the alteration, reformation, abolishment or amendment of the sections and the subject matter of the Constitution of Tennessee as set out in this act shall be duly certified by the president and secretary of the convention and the original certified copy shall be transmitted to the Secretary of State for preservation among the official records of the state. The convention shall have no authority to meet beyond July 31, 1978."

In that event, the question presented here shall have become moot after the adjournment date. If the decision in this case is not reached before the adjournment date, the question would exist only in the abstract without relation to a situation where there is a demonstrable prejudicial application of 1976 Public Acts of Tennessee, Chapter 848. In fact, the law itself will cease to have validity after July 31, 1978 or the date of adjournment which ever is first to arrive.

This Court has held that "federal courts are without power to decide questions that cannot affect the rights of litigants in this case before them." *DeFunis v. Odergaard*, 416 U.S. 312 at 316. This appellee contends that there are no parties other than appellant, Paul McDaniel, who are before this Court in this case, the trial court and the Supreme Court of Tennessee having found that no legitimate class exists as to others than appellant and others as candidates for the limited constitutional convention called pursuant to 1976 Tennessee Public Acts, Chapter 848.

The posture of appellant's counter-claim after remand to the trial court were seen by the Supreme Court of Tennessee as follows:

> "Reverend McDaniel filed a counter-complaint, cross-complaint and third party complaint on October 21, 1976, following this Court's remand of the first appeal. The action was brought on behalf of himself and all other ministers of the gospel, all priests of any denomination whatever, present and future, (1) who wish to seek election as delegates to the 1977 constitutional convention or any future constitutional convention and (2) who wish to seek election as members of either body of the General Assembly of this State; and as a class action on behalf of himself and all independent voters who (1) wish to vote for delegates to the 1977 limited constitutional convention and all future constitutional conventions, (2) who wish to vote for candidates for election as members of the House or Senate and (3) who wish to vote for ministers of the gospel or priests of any denomination whatever in the November 2, 1976, election or any future election to a constitutional convention or to both bodies of the General Assembly of this state." *Paty v. McDaniel*, 547 S.W. 2d at 909.

The Chancellor in the Memorandum Opinion decreed that the appellant is eligible to be a candidate and to serve as a delegate to the constitutional convention along with "all other persons similarly situated composing this class." (Appendix D, "Jurisdictional Statement," p. 42). Whether there are others who as a class are entitled to relief was decided adversely to appellant by the trial court, and this portion of the decision was affirmed in *Paty v. McDaniel, supra*.

> "McDaniel seeks a further declaration by this court that ministers of the gospel are eligible to serve in the future as members of the Tennessee General Assembly. He alleges *"he may be a candidate for election* as a delegate in future elections for delegates to a subsequent constitutional convention as well as a candidate for election as a member of the Tennessee House of Representatives or Senate in future

elections." (Emphasis supplied in original.) (Appendix D, "Jurisdictional Statement," p. A 40).

The trial court found that it was "speculative and conjectural when and if again there will be a constitutional convention" and that "it is even more speculative as to whether the General Assembly in such a call would attempt to prevent ministers of the gospel from serving as delegates." (Appendix D, "Jurisdictional Statement," p. A 40).

The Supreme Court of Tennessee concurred in this result.

> "The Chancellor correctly held in his memorandum opinion that the issues raised on behalf of said classes do not present justicable controversies under the declaratory judgment statute because they are abstract, theoretical and based upon contingencies which may not arise. 547 S.W. 2d 909-910.

In *Golden v. Zwickler*, 394 U.S. 103, the Court said:

> "The power of courts, and ultimately of this Court, to pass upon the constitutionality of act of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough. The same is true of the power to pass upon the constitutionality of state statutes. No federal court, whether this Court or a district court, has jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the Constitution, *except as it is called upon to adjudge the legal rights of litigants in actual controversies.*" (Emphasis added in original.) 394 U.S. at 110.

The existence of a definable class who are aggrieved by the law in question and to whom relief may be given was not found by the lower courts except for those in relation to the election for convention delegates on November 6, 1976. Until a new legislative call for a constitutional convention is established by

statute, the class will not again come into being. Whether it includes ministers or those wishing to vote for ministers is speculative, and until the question is again ripe it should remain unanswered. The finding by the lower courts of the lack of a legitimate class claim is an adequate and independent state ground of decision which does not amount to an evasion of the constitutional claim. *Lawrence v. State Tax Commission*, 286 U.S. 276 (1932); this finding of the lower courts as to the existence of a valid class of voters rests upon an adequate non-federal ground which should not be subject to review. *Ellis v. Dixon*, 349 U.S. 458 (1955).

CONCLUSION

Appellant urges that the decision below be affirmed on the ground that the judgment rests upon the interpretation by the highest appellate court of the State of Tennessee of its own State's Constitution, and the decision is based upon the finding of a legitimate and substantial state interest.

This Court should find that the Tennessee Constitution, Article IX, Section 1, is free from constitutional infirmities, thereby permitting the State of Tennessee to promote in its own manner its own goals. Whether, in comparison with alternative means of promoting that state interest, this is the wisest means available should not be the scale by which this law is to be measured. For, as this Court states in *Braunfeld v. Brown, supra*, "our concern is not with the wisdom of legislation but with its constitutional limitations." 366 U.S. at 608.

Respectfully submitted,

PHILLIP C. LAWRENCE
Attorney for Appellee,
Selma Cash Paty

MOTION FILED
AUG 1. 1977

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1427

REVEREND PAUL A. McDANIEL,

Appellant,

v.

SELMA CASH PATY, a Resident of Hamilton County, Tennessee; SHIRLEY HASSLER, as Coordinator of Elections of the State of Tennessee; LYTEL LANDERS, as Chairman of the State Election Commission of Tennessee; RAY BLANTON, as Governor of the State of Tennessee; BROOKS McLEMORE, as Attorney General of the State of Tennessee; JOE C. CARR, as Secretary of State of Tennessee; JAMES HARPSTER, TOMMY POWELL, RICHARD HOLCOMB, JACK SEATON, as Members of the State Election Commission of Tennessee; CHARLES HINSON, Chairman of the Hamilton County Election Commission; CLAUDE CLARK, TOMMIE CARTER, JAMES PENLEY, ALBERT W. SECOR, as Members of the Hamilton County Election Commission; and TOM MOORE, JR., as Registrar-at-Large for the Hamilton County Election Commission,

Appellees.

On Appeal from the Supreme Court of Tennessee

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF AMERICAN CIVIL LIBERTIES UNION, AMERICAN ETHICAL UNION, AMERICAN JEWISH CONGRESS, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, BOARD OF CHURCH AND SOCIETY OF THE UNITED METHODIST CHURCH, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA, UNITED CHURCH OF CHRIST, UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA, and UNITARIAN UNIVERSALIST ASSOCIATION

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IN THE

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October Term, 1976

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Appellant,

v.

SELMA CASH PATY, *et al.*,

Appellees.

On Appeal from the Supreme Court of Tennessee

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The undersigned, as counsel for Americal Civil Liberties Union, American Ethical Union, American Jewish Congress, Americans United for Separation of Church and State, Baptist Joint Committee on Public Affairs, Board of Church and Society of the United Methodist Church, National Council of Churches of Christ in the United States of America, United Church of Christ, United Presbyterian Church in the United States of America, and Unitarian Universalist Association, respectfully moves this Court for leave to file the accompanying brief *amici curiae* in support of the appellant's claim that a statute which excludes clergymen of any faith from eligibility to serve in public

office violates the Free Exercise Clause of the First Amendment to the Constitution of the United States.

Consent to the filing of the attached brief was sought from the parties. The appellant consented thereto but the appellees withheld their consent.

The interest of the *amici* is set forth in the attached brief. They include organizations which are Christian and Jewish as well as those having no religious affiliation. Their combined membership is probably in excess of sixty-five million Americans. What brings them together in this brief is a deeply-held commitment to the principle of freedom of religious belief and their conviction that disqualification of a person from public office because of his belief or his profession of that belief as a clergyman of a particular faith violates the Free Exercise Clause of the Amendment.

Each of the *amici* is able to address the constitutional issue raised on this appeal and treated in this brief, in the broad context of this country's tradition of religious freedom and each respectfully offers this Court its accumulated experience on that issue. They believe that this experience enables them to make a contribution to the consideration by the Court of this important issue.

Respectfully submitted,

/s/ LEO PFEFFER

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August 1977

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IN THE

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No. 76-1427

REVEREND PAUL A. MCDANIEL,

Appellant,

v.

SELMA CASH PATY, *et al.*,

Appellees.

On Appeal from the Supreme Court of Tennessee

BRIEF FOR *AMICI CURIAE*

Statement of the Case

The appellant, Reverend Paul A. McDaniel, an ordained clergyman and pastor of the Second Missionary Baptist Church in Chattanooga, Tennessee, filed as a candidate for delegate to the 1977 Constitutional Convention of the State of Tennessee. The appellee, Selma Cash Paty, a candidate for the same office, brought suit against him challenging his eligibility to serve by reason of a statutory disqualification rendering clergymen ineligible to serve as delegates to the convention. The Chancery Court in Tennessee ruled the exclusion of clergymen invalid under the Constitution of the United States, but the Supreme Court of Tennessee reversed and upheld the statute. Thereafter, this Court noted probable jurisdiction of the appeal by Reverend Paul McDaniel.

Interest of the *Amici*

This brief *amici curiae* is submitted by the following organizations:

The American Civil Liberties Union, a nationwide, nonpartisan organization of over 250,000 members, dedicated solely to defending the safeguards of the Bill of Rights.

The American Ethical Union, a national federation of Ethical Culture and Ethical Humanist Societies, dedicated to the concept that the highest value on earth is human worth and to a belief in the democratic process and community.

The American Jewish Congress, a nationa. organization of American Jews, organized to protect the religious, civil, political and economic rights of Jews and to promote the principles of democracy.

Americans United for Separation of Church and State, a national organization of persons of all faiths, organized to foster and protect religious liberty as set forth in the First Amendment of the Constitution of the United States and comparable provisions of the state constitutions.

The Baptist Joint Committee on Public Affairs, a national organization composed of representatives of eight major Baptist denominations and, inter alia, charged with reflecting the historic Baptist concern for religious liberty and the separation of church and state.

The Board of Church and Society of the United Methodist Church, one of four program boards of the Church,

designed to serve as the advocacy arm of the denomination, with reference to social issues and concerns for justice and the health and welfare of all persons in our society.

The National Council of the Churches of Christ in the United States of America, a cooperative agency of thirty national Protestant, Anglican and Eastern Orthodox religious bodies, which have an aggregate membership of over 40 millions persons.

The United Church of Christ, a Protestant religious denomination consisting of approximately six thousand (6,000) local churches having a membership of about one million eight hundred thousand (1,800,000) persons which, as part of its mission, seeks to make the message of the Gospel effective in society, and, therefore, is necessarily concerned with the religious and civil liberties of all persons.

The United Presbyterian Church in the United States of America, a Christian denomination with 8,675 particular churches located throughout the nation in all fifty States, the District of Columbia, and Puerto Rico, including 2,615,662 active members. Organized prior to the Declaration of Independence, this Church has been concerned about the issues of representative government and religious liberty throughout its history.

The Unitarian Universalist Association, an association of churches and fellowships in the United States and Canada, is dedicated to individual freedom of belief and to the principle of the separation of church and state.

All of the participating organizations are committed to the preservation of the dual American democratic values of religious freedom and the separation of church and state. As such they are deeply concerned with a decision sustaining a law that disqualifies a person from public office solely because of his or her religious calling. They believe that such disqualification, expressly forbidden in respect to officials and employees of the national government by Article VI of the Constitution, violates a principle and mandate which should be applicable in respect to every constituent of government in a democratic society.

Constitutional and Statutory Provisions Involved

The First Amendment to the United States Constitution provides in part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

The First section of the Fourteenth Amendment to the United States Constitution provides, in part:

> . . . nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tennessee Constitution, Article IX, Section 1, provides:

> Ineligibility of ministers and priests to seats in legislature.—Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no Ministers of the Gospel, or priests of any denomination whatever, shall be eligible to a seat in either House of the Legislature.

The provisions of the Tennessee Constitution, Article IX, Section 1, were made applicable as a qualification for election to the 1977 limited constitutional convention of Tennessee by 1976 Tennessee Public Acts, Chapter 848, Section 4, which provides in part:

> Any citizen of the state who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for delegate to the convention upon filing with the County Election Commission of his county a nominating petition containing not less than twenty-five (25) names of legally qualified voters of his or her representative district. . . .

Question to Which This Brief Is Addressed

This brief is addressed to the single question as set forth on page 3 of the Jurisdictional Statement:

> Whether the legislative call for a limited constitutional convention (1976 Tennessee Public Acts, Chapter 848, Section 4) establishing the qualifications of delegates as the same as those for membership in the House of Representatives, thus invoking the Tennessee Constitution (Article IX, Section 1) deprives appellant of the free exercise of religion guaranteed by the First and Fourteenth Amendments of the United States Constitution?

While we limit our consideration to this point, we suggest that the exclusion of clergymen from the constitutional convention also violates the Establishment Clause of the First Amendment. It violates that clause because it mani-

fests non-neutrality in respect to religion, forces or influences a person to remain away from church in his capacity of minister, and has a primary effect which inhibits religion. *Everson* v. *Board of Education*, 330 U.S. 1, 15-16 (1947); *McCollum* v. *Board of Education*, 333 U.S. 203, 210 (1948); *McGowan* v. *Maryland*, 366 U.S. 420, 443 (1961); *Torcaso* v. *Watkins*, 367 U.S. 488, 492-493 (1961); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Meek* v. *Pittenger*, 421 U.S. 349, 358 (1975).

We suggest too that the challenged statute violates the Equal Protection Clause of the Fourteenth Amendment and might also bring into play the provision in Article VI imposing upon the United States, including this Court, the obligation to "guarantee to every state in the Union a republican form of government."

Summary of Argument

Although the language of Article VI of the Federal Constitution, which states that "no religious test shall ever be required as a qualification to any office or public trust under the United States," is apparently limited in its application to federal offices, the requirement of such a qualification undoubtedly violates the provision in the First Amendment against prohibiting the free exercise of religion. The statute challenged herein violates the Free Exercise Clause because it imposes the penalty of disqualification from public office upon those whose religious conscience impels them to serve as ministers of their faith. The full applicability of the Free Exercise Clause to the states by reason of the Fourteenth Amendment is no longer open to question.

While the prohibition of the Religion Clause of the First Amendment is not absolute, the burden is upon the State of Tennessee to establish the presence of a compelling interest that justifies infringing upon the citizen's right to the free exercise of his religion. The State of Tennessee has not presented—nor can it present—any interest sufficiently compelling to justify impairment by a religious test for political office.

ARGUMENT

POINT ONE

The historic background of religious tests for public office and of the Free Exercise Clause of the First Amendment establishes the intent of the Framers of the Amendment to incorporate therein the ban upon religious tests.

A. Introductory Statement

Initially we note that the explicit provision in Article VI of the Constitution that "no religious test shall ever be required as a qualification to any office or public trust under the United States" does not mandate a holding that the prohibition excluded religious tests from the ambit of the First Amendment's ban on laws respecting an establishment of religion or prohibiting its free exercise. In the first place, the prohibitions of the First Amendment go far beyond religious tests for public office. They include, for example, laws appropriating tax-raised funds for the support of religious schools, laws excluding Sabbatarians from the benefits of unemployment compensation programs by reason of their refusal to accept employment requiring them

to violate their Sabbath, and laws penalizing parents for refusing because of their religious conscience to send their children to public schools so long as they receive an equivalent education in nonpublic schools including church-related schools. *Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

Secondly, the ban on religious tests for public office is not the only instance in which a right explicitly protected in the Constitution may also be protected in the Bill of Rights. The guaranty of jury trial in criminal cases, for example, is secured in Article III of the Constitution and again in the Sixth Amendment.

It follows from this that no inference of intended exclusion from the First Amendment can be drawn from the fact that the Amendment does not expressly refer to religious tests for public office. On the contrary, the history of such tests and the response to it by those who wrote our Constitution and Bill of Rights leaves no doubt they deemed them to be violative of both the Free Exercise and Establishment provisions of the First Amendment. It also follows from this that the incorporation of both aspects of the First Amendment—the Free Exercise and Establishment Clauses—into the Fourteenth, mandates the same judicial scrutiny and the application of the same constitutional tests as would be called for if it were an act of Congress rather than a state statute that would be before this Court.

B. The History of Religious Tests for Public Office

During the colonial era, before the onset of disestablishment of religion and the separation of church and state,

clergymen were prominent in government. In theocratic New England, clergymen were often more than in government—they were the government. It was therefore almost inevitable that the advance of separation should bring with it a movement to exclude clergymen from political office. As early as 1778 a resolution was offered in the Continental Congress "that the sense of the house be taken, whether it is proper that Congress should appoint any person of an ecclesiastical character to any civil office under the United States." The Continental Congress, dominated as it was by clergymen and preoccupied with religion, took no action on the motion.[1]

A different situation prevailed in the states. At the time the Constitution was adopted, seven states had constitutional provisions barring clergymen from serving in the legislature[2] or, in some cases, from holding any political office.[3] By the end of a half century after independence the number had increased to thirteen.[4] North Carolina, in its constitution of 1776, was the first state to adopt a bar against the election of a clergymen to the legislature, but the New York constitution of the following year contained a broader exclusionary provision, adopted purportedly for the benefit of the clergymen themselves. Article 31 provided:

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1. E. F. Humphrey, Nationalism and Religion in America (1924) p. 408.

2. The states were Maryland, Virginia, North Carolina, and Georgia. L. Pfeffer, Church, State, and Freedom (Rev. ed., 1967) p. 118.

3. The states were New York, Delaware and South Carolina. *Ibid.*

4. A. P. Stokes, Church and State in the United States (1950), Vol. 1, p. 622.

> And whereas the ministers of the gospel are by their profession, dedicated to the service of God and the care of souls, and ought not to be delivered from the great duties of their function; therefore, no minister of the gospel or priest of any denomination whatsoever, shall at any time hereafter, under any pretence or deception whatever, be eligible to or capable of holding any civil or military office or place within this State.[5]

In the draft of a constitution for Virginia that Thomas Jefferson prepared in 1778, he included a provision barring ministers of the Gospel from holding political office, because he believed that such an exclusion was required by the principle of separation of church and state. James Madison, on the other hand, felt that the same principle prohibited such an exclusion. Commenting on Jefferson's proposal, he said:

> Does not the exclusion of ministers of the Gospel as such violate a fundamental principle of liberty by punishing a religious profession with the deprivation of a civil right? Does it not violate another article of the plan itself which exempts religion from the cognizance of Civil power? Does it not violate justice by at once taking away a right and prohibiting a compensation for it? Does it not in fine violate impartiality by shutting the door against Ministers of one Religion and leaving it open for those of every other?[6]

It was Madison, rather than Jefferson, whose position was vindicated in time. Jefferson himself came around to

5. F. N. Thorpe, Federal and State Constitutions, Colonial Charters and Other Organic Laws (1909), Vol. V, p. 2637.

6. Writings of James Madison, ed. G. Hunt (1900-1909), Vol. V, p. 288.

Madison's view, giving up his opposition to civil office for clergymen, and asserting no opposition to the inclusion of the ban on religious tests in the Constitution.[7]

The history of religious tests for public office in the states also vindicated Madison's position. By the end of the first quarter of the 19th century the number of states whose constitutions barred clergymen from holding political office increased to thirteen.[8] Thereafter, however, no further state constitutions included the prohibition and, with the exception of Maryland and Tennessee, all the states which did have the prohibition eliminated it either by constitutional amendment or by adoption of a new constitution which did not include it. As noted in the opinion of the court below (Jurisdictional Statement, p. 7-8), the Maryland prohibition was adjudged unconstitutional in *Kirkley v. State of Maryland*, 381 F. Supp. 327 (1974), and the state elected not to appeal the decision. Today, only Tennessee retains the exclusion of clergymen from political office.

The explanation for this historic development is fairly obvious. The original state constitutions and those adopted up to the end of the first quarter of the nineteenth century reflected the strong wave of anti-clericalism which was spawned by the French Revolution and exerted considerable influence in this country. Time proved that the experience of 18th century France and the fears of clericalism which it engendered were unrealistic in our society and that the exclusion of a particular profession from eligibility to serve in political office could not be reconciled with our commitment to governments by, of and for all the people.

7. A. P. Stokes, *supra*, footnote 4, Vol. 1, p. 624.

8. L. Pfeffer, *supra*, footnote 2, p. 222.

POINT TWO

Religious tests for public office violate the Free Exercise Clause of the First Amendment made applicable to the states by the Fourteenth.

A. Introductory Statement

It is, of course, no longer open to question that both the Free Exercise and the Establishment Clauses of the First Amendment are applicable to the states through the Fourteenth. *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Everson* v. *Board of Education,* 330 U.S. 1 (1947). Moreover, what is incorporated into the Fourteenth Amendment is not merely the bare text of the First but its judicial interpretation as well (and *vice versa*). It follows from this that if, as we believe, the Free Exercise Clause encompasses a ban on religious tests for public office that ban is applicable to the states by virtue of the Fourteenth Amendment.

B. Free Exercise and Religious Tests

It has often been noted that the history of the struggles for the free exercise as well as disestablishment of religion in the states and particularly in Virginia, before the adoption of the national constitution and its bill of rights, is of significant importance in construing the meaning and intent of the First Amendment. (The Court's opinion in *Everson* and Justice Rutledge's dissenting opinion in that case are obvious examples.) This history indicates clearly that the Free Exercise guaranty of the First Amendment was intended to encompass a prohibition of religious tests for public office.

But one year before our Constitution was adopted and only three years before the First Amendment was presented to Congress for its approval, Virginia enacted its monumental Act for Establishing Religious Freedom. That statute, drafted by Jefferson and enacted by the legislature under Madison's leadership, provided in part as follows:

> That our civil rights have no dependence on our religious opinions, any more than on our opinions in physics or geometry; that therefore the proscribing of any citizen as unworthy of public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right; that it tends only to corrupt the principle of that religion it is meant to encourage by bribing with a monopoly of wordly honors and emoluments, those who will externally profess and conform to it.
>
> The operative section of the act provided that . . . no man . . . shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, *and that the same shall in no wise diminish, enlarge or affect their civil capacities.* (Emphasis added.)

It need hardly be added that the fact that the individual may receive monetary compensation for the expression of his opinions in religious matters or earn a livelihood thereby does not make less the mandate that his civil capacities shall not be affected thereby. *Follett* v. *Town of McCormick,* 321 U.S. 573 (1944); *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943).

The decisions of this Court have consistently applied the spirit of the Virginia statute in its decisions on the free exercise of religion. In earlier cases, it applied to challenges under the Free Exercise Clause the same test applicable to the Free Speech Clause: that is, the clear and present danger test. In applying this test the Court recognized "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945); *Marsh* v. *Alabama,* 326 U.S. 501, 509 (1946); *Prince* v. *Massachusetts,* 321 U.S. 158 at 164 (1944). Hence, "any attempt to restrict these liberties," the Court held, "must be justified by clear public interest threatened not doubtfully or remotely, but by clear and present danger." *Thomas* v. *Collins,* 323 U.S. at 530. See also *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 639 (1943).

Applying this test, the Court held violative of the Free Exercise Clause a New York statute which declared that the Russian Church in America rather than the representative of the Moscow Patriarchate was the true Russian Orthodox Church and therefore entitled to obtain possession of the Russian Orthodox Church property in the state. *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94 (1952).

Most pertinent and cogent is the Court's unanimous decision in *Torcaso* v. *Watkins,* 367 U.S. 488 (1961), holding unconstitutional as an abridgement of freedom of religion a provision in the Maryland constitution requiring of all state officials, including notaries public, an oath or declaration that they believed in the existence of God. In

the present case, the Supreme Court of Tennessee sought to distinguish *Torcaso* as follows:

> . . . The [United States Supreme] Court said that the test oath is abhorent to our tradition and that neither a state nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." In our opinion, Article IX, Section I does not have the effect of forcing ministers and priests to profess a belief or disbelief in any religion. The test oath clearly intruded upon the freedom to believe or to disbelieve, and no state interest to justify its imposition was, or could be asserted.

We are unable to see how the provision challenged in the present case intrudes less clearly upon freedom to profess a belief in religion than the exclusion from public office in *Torcaso.* It can hardly be argued that freedom to believe does not encompass freedom to profess or practice that belief even, as we have shown, as an aspect of one's livelihood. Nor, as we will seek to establish below, can we see any state interest justifying imposition of such a religious test for public office.

Beginning with *Sherbert* v. *Verner,* 374 U.S. 398 (1963), the Court in First Amendment cases has spoken in terms of compelling interest. Like the clear-and-present danger test, the compelling-interest test is based on the premise that the liberties protected by the First Amendment are fundamental in our constitutional democracy and therefore stand in a preferred position in our scale of values. Hence, as the Court said in *Sherbert* (at 406), "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

The trend of the Court's decisions in applying the compelling interest test has been toward an ever broader interpretation and application of the Free Exercise Clause. Thus, in *Sherbert,* the Court held that a denial of unemployment benefits because of a woman's refusal to accept a position that required her to work on Saturday, violated the Free Exercise Clause. In the case of *In re Jenison,* 375 U.S. 14 (1963), it held that a woman whose conscience forbade her from serving on juries because it would violate the Biblical command, "Judge not that ye be not judged," could not, consistent with the Free Exercise Clause, be held in contempt of court. And in *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), the Court held that the Free Exercise Clause forbade prosecution under a state's compulsory school attendance law of Amish parents whose religious conscience would not allow them to send their children to secondary schools.

In sum, under the present interpretation of the Free Exercise Clause, government, state or federal, can restrict the expression or exercise of religion only by showing: (1) that there is a counter governmental interest of such importance as to be deemed compelling; and (2) that there is no alternative for its protection other than the limitation on the free exercise of religion.

C. Present Danger and Counter-Governmental Interest

Measured by either standard we submit that the challenged Tennessee statute cannot survive judicial scrutiny. What clear and present danger to any valid public interest is prevented by the statute? What compelling counter-governmental interest exists which cannot be protected ex-

cept by disqualifying clergymen from serving as delegates to the state's constitutional convention? None is presented in the opinion of the Tennessee Supreme Court nor can we think of any independently.

It cannot be the anti-clericalism that motivated these exclusionary statutes when they were initially adopted. Even if this feeling towards clergymen still exists in Tennessee, which is highly doubtful, it certainly does not justify the deprivation of so important a constitutional right as to serve in the legislature or in a constitutional convention. It cannot be the fear that, if clergymen are allowed to act as legislators or members of a constitutional convention, they will subvert their secular duties to their religious obligations. Under Article VI of the Federal Constitution they are bound by oath or affirmation to support that Constitution and, until the contrary is proved, it cannot be assumed that they will violate their oath or affirmation. Even if it is conceded that their religious beliefs may influence their votes on particular provisions of a proposed constitution, the same is no less true of all the citizens of Tennessee who have the last word and will ultimately be called upon to accept or reject the constitution proposed by the convention. Should not then all citizens having strong feelings in respect to religion, from pietist to atheist, be disqualified, leaving the franchise to those, if there are any, who are completely neutral in respect to religion? This conclusion may be absurd, but it is the only one that can validly sustain the constitutionality of the challenged law.

Justification of the challenged statute under either the clear and present danger or the compelling counter-governmental interest test is, we suggest, practically impossible

in view of the fact that only a minority of states ever enacted and only Tennessee still maintains a religious test for public office. The history of these tests, including the barrier in Article VI of the national constitution, their elimination by repeal or abandonment in those states which still had them in the post-1787 decades and the refusal of all the other states to adopt them bears strong evidence that they cannot survive scrutiny under either the clear-and-present-danger test or the compelling government interest standard.

In *Wisconsin* v. *Yoder*, this Court said:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. 406 U.S. at 215.

Adherence to that principle, we submit, requires invalidation by this Court of the challenged Tennessee statute.

Conclusion

For the reasons set forth, the judgment appealed from should be reversed and the challenged statute be declared unconstitutional.

Respectfully submitted,

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